IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-855

WARNER-LAMBERT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

PETITION (WITH APPENDIX) FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Warner-Lambert Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia insofar as it affirmed the Federal Trade Commission's order and to review the order of that court denying Warner-Lambert's application for leave to adduce additional evidence.

OPINIONS BELOW

The Opinion and the Supplemental Opinion on Petition for Rehearing of the court below (including the dissents of Judge Robb), set forth at Pet. App.

51a and 87a,[1] are reported at 562 F.2d 749. No opinions accompanied the earlier denial of Warner-Lambert's application for leave to adduce additional evidence (Pet. App. 50a) or the denial (Judges Tamm, MacKinnon and Robb dissenting) of its suggestion for rehearing *en banc* (Pet. App. 96a). The opinion and order of the Federal Trade Commission (Pet. App. 1a) are reported at 86 F.T.C. 1398. The Commission's order denying Warner-Lambert's petition to reopen the proceedings (Pet. App. 48a) is reported at 87 F.T.C. 619.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1977. (Pet. App. 51a) Petitions for rehearing filed by Warner-Lambert and the Federal Trade Commission were denied on September 14, 1977 (Pet. App. 95a, 96a, and 97a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Federal Trade Commission has entered an order that prohibits future Listerine advertising, including concededly truthful advertisements not dealing with relief of colds symptoms, unless the first $10 million of such advertising includes a corrective message stating that "Listerine will not help prevent colds or sore throats or lessen their severity." This message expresses the Commission's position on a subject of genuine and continuing scientific controversy; but it is

[1] The appendix to this petition is cited "Pet. App." The proceedings before the FTC are reported in the Joint Appendix before the court below, which is cited "J.A."

inconsistent with published determinations by a Food and Drug Administration panel of experts and contrary to beliefs held by petitioner in good faith on the basis of reputable medical and scientific opinion. The Commission did not find that Warner-Lambert's cold symptoms relief claims were made in bad faith, and the court of appeals found that the record could support a finding of good faith. The following questions arise:

1. Whether the Federal Trade Commission violated petitioner's First Amendment Constitutional rights by prohibiting future Listerine advertising unless it contains a mandatory "corrective" message (a) which is unrelated to and not needed to cure deception in such advertisements and (b) which seeks to present as unqualified fact the Commission's view on a subject of genuine scientific controversy.

2. Whether the Federal Trade Commission and the court below erred in refusing to consider evidence related to a determination by a Food and Drug Administration panel of experts regarding Listerine's effectiveness for the relief of colds symptoms which was contrary to the view of the Commission.

3. Whether the Federal Trade Commission's statutory authority to issue "cease-and-desist" orders under the Federal Trade Commission Act includes the power to order "corrective advertising."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

Section 5(a)-(c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a), (b) and (c), provided,[2] in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are decided unlawful.
>
> * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships or corporations, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it . . . shall issue . . . an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing of petitions for review . . . or . . . until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. . . .
>
> (c) . . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

[2] After the complaint issued in this case, Section 5(a) and (b) were amended by adding the words "or affecting" before "commerce" and by the renumbering of paragraph (a)(6) as paragraph (a)(2). 88 Stat. 2193, 89 Stat. 801, 15 U.S.C. (Supp. V) 45(a)(1), (2).

STATEMENT

Listerine Antiseptic was formulated in 1879 and dispensed through physicians and pharmacists for more than 40 years before it was advertised directly to consumers. This case involves a Federal Trade Commission proceeding against certain claims for relief of colds and sore throat symptoms made in advertisements for Listerine, claims which the company successfully defended in five prior FTC investigations or evidentiary proceedings and which have been made since 1879 without challenge by the Food and Drug Administration. Advertisements concerning Listerine's effectiveness against bad breath, which accounted for more than 80 percent of the product's advertising in the ten years preceding the complaint, were not questioned by the FTC.

(a) The Federal Trade Commission Decision

This proceeding is the first and only litigated case in which the Federal Trade Commission has ordered so-called "corrective advertising."[3] The order issued

[3] "A corrective advertising order . . . requires an advertiser to make certain disclosures regardless of whether they are necessary to prevent future advertisements from being misleading." This contrasts with "affirmative disclosure" orders, which forbid "an advertiser from making representations which are deceptive unless he discloses facts which remove the deception." Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 Iowa L. Rev. 664, 706-07 (1976).

by the Commission, as modified by the court below,[4] requires that all advertisements for Listerine, until approximately $10 million has been expended on such advertising, contain the following language:

> Listerine will not help prevent colds or sore throats or lessen their severity.

The mandated language is required in all advertisements, even though the advertisements themselves are entirely truthful and wholly unrelated to colds and sore throats. (Pet. App. 46a)

The Federal Trade Commission did not find that this language was necessary to prevent future advertisements from being deceptive. In rejecting Warner-Lambert's First Amendment objections to the order's "corrective advertising" requirements, the Commission conceded that the order constituted "regulation of *truthful* commercial speech" (Pet. App. 33a, emphasis supplied); but it nevertheless ordered that the language be included as an "affirmative action" (Pet. App. 24a) designed to eliminate any "lingering effects" from the past advertisements it had found to be false (Pet. App. 24a, n.24).

The complaint which led to the order described above was issued by the Commission in June 1972. Insofar as is pertinent to this petition, the complaint

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[4] The court of appeals modified the FTC's order by directing the deletion of an introductory phrase ("contrary to prior advertising"), finding that this "confessional preamble" was neither necessary to attract attention nor appropriate in a case such as this, where "the record compiled could support a finding of good faith." (Pet. App. 74a-76a) The Federal Trade Commission made no findings and its opinion offered no reasons for the requirement of this phrase.

charged that Warner-Lambert had falsely represented that Listerine would "prevent colds and sore throats" and would "cause colds and sore throats to be less severe than they otherwise would be."[5] (Pet. App. 1a, n.29 at 32a) Warner-Lambert denied these and other substantive allegations of the complaint. (Pet. App. 1a)

The Commission concluded that the advertisements in issue made the claims alleged in the complaint. (Pet. App. 3a) It also found by a preponderance of the evidence that the use of Listerine would be of no benefit in reducing the number or severity of colds and would not provide any relief from cold symptoms. (Pet. App. 17a-18a) While virtually all witnesses stated that Listerine would provide temporary relief from sore throat due to cold, the Commission found that comparable relief could be obtained from salt water, and "that this temporary relief is not the 'significant relief' promised by respondent's advertisements." (Pet. App. 8a)[6]

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[5] The complaint also contained an allegation that Warner-Lambert had misrepresented the results of its most recent tests or studies. This charge was dismissed, based upon a finding that Warner-Lambert "cannot be said to have acted unreasonably" when it relied upon studies which had been considered in detail by the Federal Trade Commission in connection with the dismissal of a prior complaint challenging essentially the same colds claims for Listerine as are in issue here. (J.A. 564; Pet. App. 1a, n.1)

[6] The only claims related to "sore throat" in the record are in two statements which appear on Listerine labels: "For Bad Breath, Colds and Resultant Sore Throats," which appeared prior to 1973, and "For Relief of Cold Symptoms and Minor Sore Throats Due to Colds," which has appeared from 1973 to the present. (Pet. App. 3a-7a)

(b) The Concurrent Food and Drug Administration Proceedings

At about the time the complaint in this case was issued, the Food and Drug Administration adopted procedures for determining whether over-the-counter (OTC) drugs, including Listerine, are safe, effective, and correctly labeled.[7] 21 C.F.R. § 330 (1977). While the *Listerine* case was pending before the full Commission, the Federal Trade Commission announced a "Proposed [Industry] Rule Concerning Over-the-Counter Drugs," 40 Red. Reg. 52631 (1975). Under the terms of this proposed industry regulation, the Commission will in effect adopt the findings of the FDA review program and proceed against advertising for OTC drugs which conflicts with the monographs issued under the FDA review program.

Pursuant to the FDA's OTC review procedures, a panel of experts was established to study "Over-the-counter cold, cough, allergy, bronchodilator, and antiasthmatic drug products." 37 Fed. Reg. 9464 (1972). In February 1976, two months after the order was entered in the present case, the panel issued its draft report. (J.A. 3090)

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[7] Under the procedures established by the Food and Drug Administration, independent expert panels were appointed to review all available medical and scientific data concerning the safety and efficacy of ingredients used in over-the-counter products, and to determine the safety and efficacy of the ingredients and the claims which could be made for them. The panel's report is subject to public comment prior to final action by the Commissioner of Food and Drugs. 21 C.F.R. § 330.10(a)(6) (1977)

The Food and Drug Administration has jurisdiction over the labeling of drug products, including Listerine. The Wheeler-Lea Amendments to the Federal Trade Commission Act defined the Commission's jurisdiction over drug advertising to exclude labeling. 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1).

In its draft report, the panel of experts recommended that Listerine be classified in "Category III" (J.A. 3018, 3213), a category which it defined as appropriate for drugs "which in their judgment are likely to be safe and effective, but for which more data are needed" (J.A. 3143). The Commissioner of Food and Drugs has formally declared that "[c]lassification of an ingredient or claim in Category III represents a preliminary determination that general recognition of safety and effectiveness can be shown with further testing." 42 Fed. Reg. 19137, 19139 (1977).[8] The panel evaluated a wide variety of evidence concerning the pharmacological properties of Listerine's ingredients, including a clinical study which was part of petitioner's proof before the FTC which the panel described as showing "milder nasal symptoms and [cough] symptoms" for Listerine users as compared to a control group which did not use Listerine. On the basis of these evaluations, the panel recommended further study to determine the necessity for and contribution of each ingredient claimed to be active.[9] (J.A. 3018, 3045-46, 3213)

Warner-Lambert petitioned the Commission to reopen the record to consider the FDA panel report's findings relating to the efficacy of Listerine. (J.A.

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[8] Drugs deemed not safe and effective are placed in Category II. Category I drugs are those deemed safe and effective without need for further testing. 21 C.F.R. § 330.10(a)(6) (1977).

[9] Under the FDA rules governing the OTC review program, Listerine could continue to be labeled for the relief of colds symptoms, pending the outcome of this future testing. *E.g.* 41 Fed. Reg. 38312, 38314 (1976). The FTC's proposed rule would prohibit advertising of Category II claims. 40 Fed. Reg. 52631 (1975). Continued advertising of claims accorded Category III status in the FDA review program was contemplated by the FTC. (J.A. 972-73)

922) On March 26, 1976, the Commission denied the petition to reconsider on the ground that the conclusion of the FDA's expert panel with respect to Listerine was in a draft report and thus did not properly constitute a "finding". (Pet. App. 49a)

After the record of the FTC proceeding had been filed with the court of appeals, thereby depriving the Commission of further jurisdiction, the advisory panel to the Food and Drug Administration issued its final report. 41 Fed. Reg. 38312 (1976).[10] This report repeated the pertinent conclusions reached in the draft report. 41 Fed. Reg. 38348, 38351, 38353, 38409, 38411, 38413 (1976). Pursuant to 15 U.S.C. § 45(c), Warner-Lambert applied to the court of appeals for leave to adduce additional evidence before the Commission. This application was denied without opinion. (Pet. App. 50a)

(c) The First Court of Appeals Opinion

On August 2, 1977, the court of appeals affirmed, with one modification, the order issued by the Federal Trade Commission. (Pet. App. 51a) The court of appeals held that "the Commission's conclusion that Listerine is not beneficial for colds or sore throats" was "supported by substantial evidence on the record viewed as a whole," and sustained the Commission's finding of a violation of § 5 of the Federal Trade Commission Act. (Pet. App. 54a) The court did, however, state that "the record compiled could support a finding of good faith" by the company in making claims for Listerine of symptomatic relief of colds.

[10] The panel report recommended a monograph, which the Commissioner issued for public comment, after which he is to issue a final monograph. 41 Fed. Reg. 38312-14 (1976).

(Pet. App. 76a)[11] The court of appeals rejected Warner-Lambert's argument that the FDA advisory panel had found Listerine "likely to be effective"[12] and

[11] In defense of its claims for Listerine before the FTC, Warner-Lambert had presented medical and scientific studies, including clinical tests, to demonstrate the effects of Listerine and its active ingredients on various cold symptoms and upon the viruses and bacteria which play a role in the development and aggravation of colds symptoms. In addition, Warner-Lambert called expert witnesses from prominent universities, independent testing laboratories, and the company's scientific staff, who described and evaluated the various studies and testified that, based upon the studies they had reviewed, Listerine would be effective for the relief of cold symptoms, including sore throat, and in some circumstances could lead to a reduction in the number of colds. (Based upon the results of the first half of a colds study begun by Warner-Lambert in 1967, Warner-Lambert had ceased all references to "fewer colds" in the Fall of 1969. No such references have been made since that time.) These witnesses included a former Medical Director of the Food and Drug Administration and three eminent physicians from the faculties of prominent medical schools, one of whom had been clinical director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health and another of whom had been selected by the Federal Trade Commission to conduct its well-known comparative study of analgesics. (J.A. 1649-80, 1713-23, 1764-69, 1793-95, 1798-1806, 1927-42, 1966-1979, 1991-92, 2057-70, 2087-94, 2100-19, 2135-43, 2148-50, 2415-16, 2422-23, 2425-28, 2457-74, 2506-15, 2599-2611, 2681-95, 2747-64) The Commission elected to rely on "experts [called by the Commission] who based their views on their general medical and pharmacological knowledge" rather than those called by petitioner. (Pet. App. 15a-16a) None of the Commission's expert witnesses had worked with Listerine or conducted any tests regarding its efficacy.

[12] The term "likely to be effective" was taken from the portion of the panel's report which defined the standard to be applied in determining whether or not drugs are to be accorded Category III status. It was upon this language of the panel itself that Warner-Lambert relied before the court of appeals. In his statement adopting a final rule concerning Category III, 42 Fed. Reg. 19137, 19139 (1977), the Commissioner of Food and Drugs endorsed this approach: "Classification of an ingredient or claim in Category III

concluded that the findings of the panel were "not necessarily inconsistent with the FTC's conclusion that Listerine's advertising claims are deceptive." (Pet. App. 60a)[13] Accordingly, the court of appeals held that the "FTC did not err in refusing to reopen its proceedings to consider the draft FDA study, and the FDA findings do not establish that the FTC's conclusions are wrong." (*ibid.*)

Having concluded that the FTC's decision on violation was supported by substantial evidence, the court of appeals addressed the issue of remedy. The court rejected Warner-Lambert's arguments that the "corrective advertising" remedy contravened the First Amendment and exceeded the Commission's statutory authority. Instead, the court concluded that, because the FTC could require an affirmative disclosure necessary to prevent future advertisements from being deceptive (Pet. App. 66a-70a), it followed that all advertisements, even if completely truthful, could be prohibited unless they contained "informa-

represents a preliminary determination that general recognition of safety and effectiveness can be shown with further testing." The safety of Listerine has been stipulated. (J.A. 2819)

[13] In contrast, the staff of the Federal Trade Commission has taken the position that the panel report is in conflict with the Commission's conclusions. After briefing before the court of appeals was closed, the Commission's staff filed a lengthy comment with the Commissioner of Food and Drugs requesting "that the Commissioner of Food and Drugs not accept . . . the recommendations of the Panel" which pertained directly to Listerine, arguing that the panel's recommendations were inconsistent with the conclusions of the Federal Trade Commission. ***Comment of the Bureau of Consumer Protection of the Federal Trade Commission Concerning the Report of the Advisory Review Panel on Over-the-Counter (OTC) Cold, Cough, Allergy, Bronchiodilator** [sic] **and Anthiasthmatic** [sic] **Products (41 FR 38312),*** Docket No. 76N-0052.

tion to correct a widely held, mistaken belief which was cultivated by . . . past advertising." (Pet. App. 67a-68a, n.52) At no point in its first opinion did the court of appeals suggest that future Listerine advertisements would themselves be deceptive without the required corrective statement.

(d) The Supplemental Court of Appeals Opinion

In its Petition for Rehearing and Suggestion for Rehearing En Banc, Warner-Lambert asserted that the court of appeals opinion had failed to address serious First Amendment questions and argued (1) that the First Amendment precluded the FTC from imposing a "corrective" order mandating speech in an area of scientific controversy and (2) that the First Amendment precluded the FTC from burdening future truthful advertising with an unrelated "corrective" message. In addition, Warner-Lambert argued that the court had failed to give appropriate weight to the report of the FDA expert panel on cough and cold products. The Suggestion for Rehearing En Banc was denied, with Judges Tamm, MacKinnon and Robb dissenting. (Pet. App. 96a) "Because of the importance of the issues raised," the original majority issued a Supplemental Opinion on Petition for Rehearing, which "set forth in some detail [its] reasons" for rejecting Warner-Lambert's First Amendment arguments. (Pet. App. 87a)

In its Supplemental Opinion, the court of appeals did not address the First Amendment question raised by Warner-Lambert's first argument and thus did not deal with the constitutional issues arising out of an order mandating speech in an area of genuine controversy. The court did, however, acknowledge that

> A more serious First Amendment problem which may be raised by corrective advertising orders involves the burden thereby imposed upon the constitutional right recognized in *Virginia State Board* to advertise truthfully: the party subject to a corrective advertising order may be precluded from exercising his right to advertise unless he also includes specified statements undermining his prior deceptive claims. (Pet. App. 91a)

The court then declared that "[o]n the facts of this case, no burden is imposed upon truthful, protected advertising since, as the Commission makes clear, Listerine's current advertising, if not accompanied by a corrective message, would itself continue to mislead the public." (Pet. App. 91a)

In fact, the Commission had not made any such finding about deceptiveness of future advertising (*supra*, p. 6) and had specifically declined to consider this point (Pet. App. 32a, n.28). The court of appeals' first opinion had affirmed the Commission's corrective advertising order without addressing the truthfulness of future Listerine advertising (*supra*, p. 13). However, on rehearing, the court obviously believed that a "finding" that the corrective message was needed to cure deception in future advertisements was essential to the court's conclusion that the Commission's order imposed no burden "upon truthful, protected advertising." (Pet. App. 91a)

REASONS FOR GRANTING THE WRIT

This case presents novel and important questions as to the proper scope of regulation of advertising and the validity of the extraordinary remedy of "corrective advertising" propounded by the Federal Trade

Commission. Under the order below, respondent will be compelled to state that Listerine has no efficacy in alleviating the symptoms of colds or sore throats. This unequivocal language is to be required, notwithstanding the fact that there is a genuine scientific controversy about Listerine's efficacy in those respects and that the petitioner's position is reasonably held. Furthermore, the "corrective" language is required not in connection with claims of cold symptoms relief (which are prohibited), but in advertisements that make concededly truthful breath freshening claims, and do not deal at all with the subject of cold symptoms or sore throats.

Review by this Court is called for to correct error below in the application of the First Amendment to commercial speech and in interpretation of this Court's seminal opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The case also presents questions as to the proper deference to be accorded the determinations of the expert panel of the Food and Drug Administration in a concurrent proceeding; and as to the proper construction of the FTC's remedial powers under the Federal Trade Commission Act.

First, this is a case of first impression. It is the only litigated case in which the Federal Trade Commission has imposed corrective advertising.[14] The validity and propriety of this new remedy have been the

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[14] There were earlier consent orders entered by the FTC incorporating a corrective advertisement requirement. However, the consent orders do not constitute precedent or authority. *See* United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 330, n.12 (1961).

subject of substantial controversy and are at issue in a number of pending cases.[15] This is a matter of great concern to all advertisers regulated by the Commission. It should be resolved by this Court.

Second, the corrective advertising order raises serious questions about the First Amendment's application to commercial speech. In its Supplemental Opinion, the panel majority below acknowledged "the importance of the issues raised." (Pet. App. 87a) The need for resolution by this Court is emphasized by the court of appeals' erroneous and confusing shifts of position in interpreting and in attempting to meet the Constitutional requirements of the *Virginia State Board* decision.

In its first opinion, the majority below sought to dismiss the First Amendment challenge to corrective advertising by stating that "the Supreme Court [in

[15] For pending adjudicative cases in which corrective advertising is at issue see Bristol-Myers Co., FTC Docket No. 8917; American Home Products Corp., FTC Docket No. 8918; Sterling Drug Inc., FTC Docket No. 8919.

In the same year the FTC issued the complaint in issue here, the Commissioners were sharply divided on the question of such relief. Firestone Tire & Rubber Co., 81 F.T.C. 398 (1972). The initial reference to the existence of such a power by the Commission in Campbell Soup Co., 77 F.T.C. 664 (1970), provoked widespread controversy. *See, e.g.,* Lemke, *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission,* 4 U. Mich. J.L. Ref. 180 (1970); Note, *"Corrective Advertising" Orders of the Federal Trade Commission,* 85 Harv. L. Rev. 477 (1971); Note, *The Limits of FTC Power to Issue Consumer Protection in Orders,* 40 Geo. Wash. L. Rev. 496 (1972); Cornfeld, *supra,* note 3 at 5; *Advertising and the First Amendment,* Address by Philip Elman before the Food and Drug Law Institute Conference on Food Advertising and Labeling (Oct. 27, 1977).

Virginia State Board] clearly foresaw the very question before us and its statement is dispositive." (Pet. App. 66a) But the cited statement of this Court was that, to the extent regulation of advertising was constitutionally permissible, it may be appropriate

> to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent *its* being deceptive. [425 U.S. at 772, n.24; emphasis added]

The Court's carefully-framed qualifications thus left room only for requiring statements necessary to prevent a particular advertisement's ["its"] being deceptive. The corrective advertising order in this case, however, seeks to impose this requirement upon future advertisements which are not alleged to be deceptive—where, accordingly, there is nothing to correct.

In its Supplemental Opinion, the majority below evidently realized that it had misinterpreted *Virginia State Board.* Its solution was to represent the FTC's opinion as if it had indeed made the finding called for by *Virginia State Board,* i.e., that the corrective message was necessary in order to prevent future breath-freshening advertisements of Listerine from being deceptive. According to the court of appeals, the FTC had ruled that "Listerine's current advertising, if not accompanied by a corrective message, would itself continue to mislead the public." (Pet. App. 91a; *see also* Pet. App. 89a-90a) The flaw, however, is that the FTC made no such finding. The Commission deliberately rested its order only upon its alleged power to correct "lingering" beliefs from past advertising, and not

upon its long recognized authority to prohibit future deceptive advertising. (Pet. App. 31a-32a) Indeed, the Commission explicitly declined to consider whether future Listerine advertising would be deceptive. (Pet. App. 32a, n.28) The court of appeals thus clearly misstated the Commission's findings in its effort to harmonize them with this Court's authoritative exposition in *Virginia State Board.*[16]

Third, the corrective advertising order in this case is in conflict with established principles under the First Amendment. It is fundamental to the First Amendment that differing views are entitled to expression in the "marketplace of ideas" and that the right to speak includes the right not to be compelled to say that which one does not believe,[17] concepts which now must be applied to speech in the economic marketplace.

This case involves a genuine scientific and medical controversy concerning the value of Listerine and its ingredients for the symptoms of colds and sore throats. The substantiality of the question and the fact that there are two reasonably-held sides is abundantly shown by the record evidence in this case.[18] It is confirmed, moreover, by the action of the FDA's expert

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[16] The court of appeals thus sought to uphold the FTC's order on a ground not stated by the Commission, in violation of the doctrine of SEC v. Chenery Corp., 332 U.S. 194, 195 (1947).

[17] Wooley v. Maynard, 430 U.S. 705, 714-17 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-257 (1974); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

[18] *See Statement, supra,* p. 11, n.11; Petitioner's Brief in the Court of Appeals, pp. 4-25; Petitioner's Reply Brief in the Court of Appeals, pp. 3-9. Note that the court below acknowledged the basis for a finding of petitioner's good faith in asserting its claims. (Pet. App. 76a)

panel reviewing OTC cough and cold products, which classified the Listerine ingredients among those for which a preliminary determination had been made that efficacy can be shown by further testing. (*Supra,* p. 9) Yet, the order below not only would prohibit petitioner from presenting in advertising the position which it holds in good faith about its product; it would command the company to state the opposite of its view as a definitive unequivocal fact.

We submit that First Amendment principles stand in the way of this assertion of authority. While this is a case of first impression, our position is supported by lower court decisions which have followed *Virginia State Board,* and rejected undue limitation of commercial speech. Thus, the Third Circuit reversed an FTC order on the ground that "any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception." *Beneficial Corp.* v. *F.T.C.*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977). Another panel of the court below recently limited an antitrust decree and held that it was improper under the First Amendment to require a defendant to state as its opinion a position that it does not accept or believe in. *United States* v. *National Society of Professional Engineers,* 555 F.2d 978 (D.C. Cir. 1977), *cert. granted,* 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977) (No. 76-1767). *See also Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

Petitioner's rights under the First Amendment are unlawfully impaired when, as in this case, the Commission directs a "corrective" statement on the basis

of its asserted power to "choose between experts," on a subject of genuine scientific controversy. (Pet. App. 15a-16a, *supra,* n.11)[19] The Commission may have authority to develop a new standard as to the substantiation required to support an advertiser's affirmative claims and to bar claims not meeting that test. But here the Commission went far beyond such regulatory action. Instead, it purported to adopt the side of the controversy contrary to petitioner's as an unequivocal fact, and to require petitioner to proclaim the Commission's view affirmatively and unqualifiedly. This approach simply sweeps away the right of petitioner to maintain its reasonably-held position, and it cannot survive First Amendment scrutiny.

Indeed, the Commission itself in other cases has recognized that its function is not to foreclose genuine controversy. Thus, in *National Commission on Egg Nutrition,* 88 F.T.C. 89 (1976), *aff'd as modified,* Nos. 76-1969 and 76-1975 (7th Cir. Nov. 29, 1977), the Commission emphasized:

> It is certainly not the Commission's intention to determine in this proceeding whose interpretation of a difficult and incomplete body of scientific literature is superior. . . . It is manifest that "scientific evidence" as the term is commonly understood, may exist in support of a proposition whose truth is contested or for that matter, in support of a theory which is ultimately determined by general agreement not to be true at all. [*Id.* at 182] [20]

[19] The court of appeals review did not enter into the conflicting evidence, finding only that there was "substantial evidence" in support of the Commission. (Pet. App. 54a-60a)

[20] In a temporary injunction proceeding, the Seventh Circuit Court of Appeals reached a similar conclusion as to the permissible scope of an injunction. F.T.C. v. Nat'l Comm. on Egg Nutrition, 517 F.2d 485, 489 (7th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976). Similarly, in Pfizer, Inc., 81 F.T.C. 23 (1972), the Commission, explaining the "reasonable basis" required to support advertising claims, stated that its role in assessing scientific tests "should simply be one of attempting to determine the existence and general quality of the tests and a threshold determination as to the reasonableness of reliance thereon, rather than an attempt to conclusively determine the adequacy of the tests." *Id.*, n.22 at 67. *See also* Lambert Pharmacal Co., 38 F.T.C. 726 (1944); Scientific Mfg. Co. v. F.T.C., 124 F.2d 640, 644 (3d Cir. 1941). The Commission made no "threshold determination" here that petitioner's evidence was inadequate, and it could not do so; instead, the Commission sought to resolve the controversy on its view of the preponderant opinion and to command a statement corresponding to such opinion, which was improper.

In *Egg Nutrition,* the Commission limited its relief for a violation to the requirement that the respondent, NCEN, when making the disputed claim in its advertising, shall disclose the existence of a controversy on the subject and the disagreement of other experts. (*Id.* at 204) The Seventh Circuit affirmed the requirement that NCEN be required to disclose the existence of a controversy. However, it modified the part of the order which required inclusion of a Commission-mandated statement as to the opinions of other experts on the ground that "requir[ing] NCEN to argue the other side of the controversy" in all advertising violated its First Amendment rights. (Slip op., p. 13) [21]

[21] The Seventh Circuit limited the requirement of the Commission-mandated statement to advertising in which NCEN itself "chooses to make a representation to the state of available evidence or information concerning the controversy." (Slip op., p. 13) In *Egg Nutrition,* the court, like the Third Circuit in *Beneficial Corp.,* applied the principle that the First Amendment does not permit a remedy broader than that which is necessary to prevent deception. The court distinguished the decision of the District of Columbia

Fourth, the majority below erroneously dismissed the significance of a study of cough and cold remedies conducted by an advisory panel of experts selected by the Food and Drug Administration and held that the Commission was correct in refusing to reopen the record to consider that study. Contrary to the view of the court below, the FDA panel's classification of Listerine in Category III was highly relevant, since that classification constitutes a "preliminary determination that general recognition of safety and effectiveness can be shown with further testing." 42 Fed. Reg. at 19139; *see supra,* p. 9.[22] The FDA panel had considered clinical evidence also in the FTC record, as well as material submitted by other companies and not available to petitioner at trial. *See* 41 Fed. Reg. 38347-55, 383408-14 (1976). Not only does the FDA panel report bear upon the issues in this case, but it establishes that this is an area of genuine scientific controversy—which is compelling on the petitioner's First Amendment rights.[23]

Circuit in this case on the ground that the NCEN order was preventing future deception, not correcting the effects of past advertising, as in the present case. The Seventh Circuit did not discuss the validity of the relief affirmed by the District of Columbia Circuit in this case.

[22] The court below characterized petitioner's similar definition of Category III, which petitioner based on the language used by the expert panel, as an "unwarranted" "extrapolation" from an "aberration." (Pet. App. 59a, n.23)

[23] Failure to accord deference to the FDA panel report is also inconsistent with the FTC's action in another proceeding, in which that agency itself has proposed to defer to the expertise of the FDA monographs resulting from the OTC panel review, to require advertising to conform to FDA-approved labelling, and to permit continued advertising for products in Category III. 40 Fed. Reg. 52631 (1975). But for the order below, petitioner would be able to

Fifth, as recognized by Judge Robb in his dissent, this case also presents an important question as to the FTC's authority to order corrective advertising under its power to issue orders "requiring [persons] to cease and desist" from violations of the Act, 15 U.S.C. § 45(b). The court below dismissed in a single sentence the specific and persuasive legislative history upon which petitioner and Judge Robb relied. (Pet. App. 61a)

In debating the Wheeler-Lea Amendments of 1938, Congress specifically considered the scope of remedies to be provided the FTC and the argument that the "cease-and-desist" powers provided were inadequate because "the false information or claims contained in the [prohibited] advertisement would still repose in the minds of the millions of persons who had read or listened to or been told about the advertisements."[24]

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avail itself of this rule with regard to Listerine.

It should further be noted that the FTC's assertion of power in this case to choose between experts is contrary to the principles applicable to the FDA's drug regulation, pursuant to which a drug may be validly manufactured and sold if there is sufficient supporting evidence, notwithstanding a conflicting body of scientific judgment. Under the 1962 amendments to the Food, Drug and Cosmetic Act, approval of a "new drug" requires "substantial evidence" of its efficacy and safety. 21 U.S.C. § 335(d). As the Senate Report stated, "there will frequently, if not usually, be a difference of responsible opinion" about the effectiveness of new drugs, and a new drug would properly be authorized, notwithstanding the existence of such conflict of scientific judgment, if it is "supported by substantial evidence." S. Rep. No. 1744, 87th Cong. 2d Sess., part 2, p. 6 (1962). Not even "preponderant evidence to the contrary" is sufficient to warrant exclusion of claims based on substantial evidence. *Id.* at 16.

[24] H.R. Rep. No. 1613, 75th Cong., 1st Sess., p. 26 (1937); *see* Petitioner's Brief to the Court of Appeals, pp. 29-33; Petitioner's Reply Brief, pp. 9-11. The majority below stated that the concern

In these circumstances, adoption of the 1938 amendments with only cease and desist authority reflected the clear intent of Congress that the FTC was to be limited to orders terminating allegedly false or deceptive representations. In amendments enacted in 1975, Congress adopted legislation which permits federal district courts, in cases where bad faith is proved, to order "public notification respecting . . . unfair or deceptive acts or practices," upon petition by the FTC.[25] In the words of Judge Robb below, this action "indicates to me that at least in the judgment of the Congress the Commission does not have, and is not intended to have, the power to order 'public notification' by way of corrective advertising." (Pet. App. 80a-81a)

Since the power asserted by the Commission under the statute prior to the 1975 amendments impinges upon First Amendment rights, it should not arise by doubtful implication in the face of contrary legislative history. *See United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971); *United States* v. *Jin Fuey Moy,* 241 U.S. 394 (1916).

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of Congress about civil and criminal penalties and treble damages cannot be equated with corrective advertising. (Pet. App. 62a) But the corrective advertising ordered here is far more severe and punitive than the relatively mild measures rejected by Congress.

[25] Magnuson-Moss-Warranty-Fderal Trade Commission Improvement Act, § 206, 88 Stat. 2183, 2201-02 (1975), 15 U.S.C. § 57(b). Here, there was no finding of bad faith, and the court below acknowledged that the record could support a finding of good faith. (Pet. App. 76a)

CONCLUSION

Accordingly, this petition for writ of certiorari should be granted.

Respectfully submitted,

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December 13, 1977

APPENDIX

In the Matter of

WARNER-LAMBERT COMPANY

Docket 8891

Opinion of the Commission

Dec. 9, 1975

By Engman, *Commissioner:*

I. *Background*

Respondent, the Warner-Lambert Company, manufactures Listerine Antiseptic, a mouthwash preparation. It is the purpose of this proceeding to determine whether respondent, through various labels and advertisements, has misrepresented Listerine's utility. Specifically, the complaint, dated June 27, 1952, charged Warner-Lambert with misrepresenting, through various labels, print advertisements and television commercials, that the use of Listerine Antiseptic will cure colds and sore throats, will prevent colds and sore throats and will cause colds and sore throats to be less severe than they otherwise would be. It also alleged that through the use of the statement "Kills Germs By Millions On Contact" respondent falsely represented that Listerine's ability to kill germs is of medical significance in the prevention, cure or treatment of colds and sore throats.[1]

In its answer, respondent denied representing either that the use of Listerine will cure colds and sore throats or that it will totally prevent colds and sore throats, but it admitted representing that the use of Listerine, as directed

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[1] The complaint further charged that respondent falsely represented that tests prove that children who gargle with Listerine twice a day have fewer and milder colds and miss fewer days of school because of colds than do children who do not use Listerine. Since complaint counsel have not challenged the ALJ's dismissal of this count, that issue is not before us on this appeal.

and in conjunction with a regimen of proper rest and diet, will result in fewer colds and will relieve or lessen the severity of cold symptoms to a significant degree. It further admitted that use of Listerine will not cure colds or sore throats and will not totally prevent colds or sore throats.

After extensive hearings covering thousands of pages of testimony, the administrative law judge (hereafter "ALJ") concluded that complaint counsel had sustained their burden of proof on these allegations. He issued an order which prohibits respondent from making the challenged claims in regard to Listerine, other mouthwashes and other nonprescription drugs (Part I and II). His order further requires respondent to include in all Listerine print and television advertisements during the next two years the following statement:

> Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats.

Respondent appealed from the initial decision and order claiming, *inter alia,* that the ALJ did not fairly and adequately consider the evidence on the record as a whole. It charged that Judge Berman "engaged in a wholly one-sided and unfair consideration of the factual and legal issues in this case, and that, in so doing, he has deprived respondent of a fair hearing." (RB at 9.)[2] We have reviewed the record thoroughly and have found no indication that the ALJ's findings were the products of bias or that he conducted this proceeding in an unprofessional manner. While we do not agree with every finding in the initial

[2] The following abbreviations are used in this opinion: IDF—Initial decision of administrative law judge. (cited by paragraph except as otherwise noted); Tr.—Transcript of testimony; CX—Commission exhibit; RX—Respondent's exhibit; RB—Respondent's appeal brief; RRB—Respondent's reply brief; CCB—Complaint counsel's answering brief.

decision, there is not a scintilla of evidence that the ALJ treated respondent unfairly.

II. *Did Respondent Make the Challenged Representations about Listerine?*

We agree with the ALJ's conclusion that respondent did in fact make the challenged representations that Listerine will ameliorate, prevent and cure colds and sort throats. In so concluding, we have taken into account respondent's admissions and the views of experts called by both sides to interpret the ads, but most importantly, we have studied each of the challenged labels, print ads and television commercials ourselves.

A. The Amelioration Claim

Respondent admitted making amelioration claims, *i.e.,*

> • • • that the use of Listerine as directed will cause colds and sore throats to be less severe than they otherwise would be and that such a representation encompasses the representation that such use of Listerine will relieve or lessen the severity of cold symptoms to a significant degree. IDF 39.

These amelioration claims were being made at least as late as January of 1974, as is evidenced by respondent's most recent Listerine labels.[3]

B. The Prevention Claim

Respondent also admitted representing that the use of Listerine as directed and in conjunction with a regimen of proper rest and diet will cause fewer colds. The ALJ concluded that this admission satisfies the complaint's allegation that respondent represented that Listerine will prevent colds. We agreee.

[3] CX 139b and 139o.

However, respondent has qualified its admission by contending that *all* prevention claims ceased prior to the fall of 1969. (RB 82.) Respondent's assertion is incorrect. Our review of Listerine television commercials aired in 1970, 1971 and 1972 convinces us that prevention claims were being made during that period.[4] In particular, numerous television commercials of the 1970-72 era urged the viewer to use Listerine twice a day all winter long. The message is inescapable: Use Listerine twice a day, every day, in conjunction with proper rest and diet, and you will improve your chance of warding off colds. (CX 142-A-D, CX 143C-F, CX 144A-E.) The prevention claim was also conveyed in the post-1969 period by the claim that Listerine users have a "fighting chance" against catching a cold. This "fighting chance" theme appeared in print ads as well as television commercials (CX 17, CX 32, CX 142A, CX 143C, CX 143E, CX 144A.) Even respondent's own expert psychologist, Donald E. Payne, agreed that CX 144A, a commercial aired in the 1971-72 season, had a prevention message. (Tr. 3661-3662.)

The ALJ also concluded that although it need not be shown that respondent made claims of *total* prevention, respondent's advertisements may well be understood to represent total prevention. Since the relevant allegations

[4] We also note that the ALJ found that respondent made prevention claims subsequent to 1969. In support of this conclusion the ALJ noted that consumer surveys which respondent commissioned, called "Burke Tests," demonstrate that substantial percentages of persons who had an opportunity to view the commercials perceived the message that Listerine prevented colds and sore throats. (IDF 45.) Respondent contends that the Burke Test is not "a reliable test for construing advertisements." (RB 83.) In view of respondent's admission that it made prevention claims prior to the fall of 1969 and our finding, based upon our review of the advertisements, that it made prevention claims subsequent to that date, we need no additional evidence in support of the prevention allegation, and therefore, we do not reach the question of whether the Burke Test adds additional support.

in the complaint are satisfied by a finding that respondent made qualified prevention claims, *i.e.*, that use of Listerine in conjunction with proper rest and diet will result in fewer colds, we need not reach the question of whether respondent made claims of total prevention.

C. The Cure Claims

We agree with the ALJ's conclusion that respondent represented that the use of Listerine will cure colds through the following statements:

(1) that Listerine "is for colds and resultant sore throats" (IDF 27, 25, 10.)

(2) that "those colds we do catch don't seem to last as long" (IDF 27.)

In reaching the conclusion that "for • • • colds and resultant sore throats" is a cure claim, we rely primarily on the Listerine labels and wrappers used from prior to 1938 to December 1972 which proclaimed:

LISTERINE
ANTISEPTIC
KILLS GERMS
BY MILLIONS
ON CONTACT
For General Oral Hygiene
Bad Breath, Colds and
resultant Sore Throats
Minor Cuts, Scratches
Insect Bites, Infectious Dandruff[5]

[5] Respondent incorrectly contends that the FTC lacks jurisdiction over the labeling of foods, drugs and cosmetics. *Stanley Laboratories* v. *FTC*, 138 F.2d 388 (9th Cir. 1943); *Justin Haynes & Co.* v. *FTC*, 105 F.2d 988 (2d Cir. 1939), *cert. denied*, 308 U.S. 616 (1939); *Fresh Grown Preserve Corp.* v. *FTC*, 125 F.2d 917 (2d Cir. 1942); *Houbigant* v. *FTC*, 139 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 763 (1944).

On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene Bad Breath, Colds and resultant Sore Throats."[6] By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can *cure,* prevent and ameliorate colds and sore throats.[7] It has also made this representation in numerous print advertisements which emphasized colds and prominently displayed the Listerine label.[8] However, we do not agree with the ALJ's additional finding that advertisements which simply state that "you can help with Listerine" or that "Listerine pro-

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[6] CX 49 and 50 demonstrate minor variations on this theme. In December 1972 respondent altered the label to read:

LISTERINE
ANTISEPTIC
Kills Germs By Millions
On Contact
For General Oral Hygiene, Bad Breath
Minor Cuts, Scratches,
Insect Bites, Infectious Dandruff
For Relief of Colds Symptoms
and Minor Sore Throats due to Colds

[7] Respondent claims that the ALJ reached the conclusion that "for • • • colds and resultant sore throats" is a cure claim by relying on a *per se* rule of construction that "for" means "cure." Respondent has misread the ALJ's opinion. Rather than posit a *per se* rule, the ALJ emphasized that he rested his opinion on his examination of the evidence in the record. We too rest our conclusion on an evaluation of the evidence.

[8] CX 19, CX 20, CX 23, CX 27. These ads appeared in national publications from 1968 to 1969. We note, in addition, that several advertisements which focus on Listerine's purported breath freshening ability depict a bottle of Listerine and the label thereon. CX 1, CX 7, CX 11, CX 13, CX 15, CX 28, CX 30. To the extent the label is readable in these advertisements, they make the same representation as does the label by itself.

vides a fighting chance" or a "means of fighting off colds" or "fighting back" but which do not display the label prominently are reasonably subject to the construction that a cure is represented.

Respondent's television commercial entitled "School Bus" (CX 34F, 140F) also made the claim that Listerine cures colds. In that commercial a mother extolls the virtues of gargling with Listerine twice a day or at the first sign of a cold stating, *inter alia,* "I think we've cut down on colds, and those we do catch, don't seem to last as long." We find that the statement, "those we do catch, don't seem to last as long," conveys the message that Listerine cures colds.

III. *Are Respondent's Representations about Listerine True?*

Respondent admits that "the use of Listerine Antiseptic will not cure colds or sore throats and will not totally prevent colds or sore throats," but it asserts that use of the product "• • • as directed and accompanied by a regimen of proper diet and proper rest has been demonstrated to result in fewer colds, milder colds and milder symptoms thereof, and less severe colds and sore throats." [Answer, Paragraph 6.]

Complaint counsel called numerous medical and scientific experts to the stand. Each of these witnesses had impressive credentials and was well-qualified to testify in this proceeding. It is the consensus of these experts that viruses cause the common cold and that bacteria play very little part. Virus particles enter the body through the nose (or sometimes the eyes), attach to cells in the nasopharynx, ("the back of the nose where the nose turns downward into the pharynx"—Tr. 616)[9] and begin to multiply. The

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[9] RX 14 illustrates the location of the nasopharynx.

viral activity destroys cells, causing the various symptoms of the cold to occur. These symptoms can include stuffy nose, runny nose, postnasal drip, burning sensation in the nose, sore throat, sneezing, coughing, burning eyes, fever, general malaise, muscle ache and mild headache. (ID pp. 16-18 [pp. 1417-1418 herein].)

It is also the consensus of the experts called by complaint counsel that Listerine has no efficacy in the prevention of colds and sore throats or in the amelioration of colds symptoms, including sore throats.[10] Several of these medical experts stated that gargling with Listerine could provide temporary relief from a sore throat. We agree with the ALJ that this temporary relief is not the "significant relief" promised by respondent's advertisements. More importantly, the record demonstrates Listerine would be no better than salt water or perhaps simply warm water.[11] Thus, as the ALJ found, any relief to a sore throat by gargling with Listerine is not peculiarly attributable to Listerine. (IDF 57.) It is clearly deceptive to attribute significant medical benefit to a purported medication when, in fact, the same benefit can be obtained from ordinary salt water or perhaps even warm water. *Cf. Stauffer Laboratories* v. *FTC*, 343 F.2d 75 (9th Cir. 1965.)

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[10] *E.g.*, Tr. 837-838, 860, 550, 393, 480-81, 617-18, 903-907, 1057-58.

[11] Tr. 395, 446-47, 483, 566-69, 860, 862, 1011-12. It should be noted that Dr. Modell, a pharmacologist called by complaint counsel, testified that the lower the surface tension of a gargle the better it can remove accumulated debris in the throat (a source of irritation) Tr. 1042-43. The record shows that Listerine does have a lower surface tension than salt water. However, the record does *not* show that this lower surface tension translates into meaningfully greater relief than could be obtained by gargling with salt water.

A. The Experts' Reasons for Concluding that Listerine Has No Efficacy in the Prevention of Colds and Sore Throats and in Amelioration of Cold Symptoms

In order to prevent a cold from developing or to lessen the severity of a cold, an efficacious substance must reach the affected cells of the body in therapeutic concentrations. Experts for complaint counsel concluded that gargling with Listerine would not meet these criteria for the following three reasons, each of which is a sufficient ground for concluding that Listerine lacks the claimed efficacy:

(1)

Listerine's ingredients, considered together, are present *in the bottle* in insufficient concentrations to have any utility in the prevention or treatment of a cold or sore throat when gargled (Tr. 712 and 1010-1111).[12]

(2)

Listerine does not reach the critical areas of the body. As the ALJ aptly summarized:

> The mechanism of gargling makes it virtually impossible for the gargle to reach the nasal passages or the lower respiratory tract. When gargling, the palate

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[12] *See also* Tr. 1016, 1007 (methyl salicylate) Dr. Sorrell Schwartz, a pharmacologist, claimed that the ingredient methyl salicylate, if present in great enough amounts, would increase blood flow to the throat and that this would have a counter-soothing effect because a sore throat, in large part, is the result of too much blood flow. (Tr. 683.) Since the concentration of methyl salicylate in Listerine is insufficient to have *any* effect on sore throats, we need not determine whether Dr. Schwartz was correct in asserting that a greater amount would be counter-soothing); Tr. 1008 (boric acid); Tr. 1009-1010, 687-688 (benzoic acid, used for the purpose of obtaining a certain level of acidity); Tr. 1010 (alcohol); Tr. 686, 712, 1009, 1025-26 (menthol); Tr. 678-79, 1008 (thymol); Tr. 688-691, 1010 (eucalyptol); IDF 74, 76, 77, 78, 79 and 80.

closes off the nasal passage and nasopharynx and the glottis closes off the entrance to the lower respiratory tract. The gargle is confined to the mouth chamber. Hence, Listerine would not reach the site of infection or manifestation of symptoms in any medically significant concentration. Any vapors that might reach the site where the action is would not be in therapeutic concentration and, in any event, would soon be swept away. Thus, the gargling with Listerine would be ineffective in preventing or producing fewer cold infections or in relieving or reducing the severity of cold symptoms (Gwaltney 393, 448; Hornick 483; Seal 554-56, 571, 573; Proctor 616-19; Rammelkamp 787 (sic 782); Sanders 854; Parrott 904). IDF 69.[13]

(3)

Listerine would not penetrate the infected cells.[14] Again, as the ALJ correctly noted:

> Even if gargling with Listerine caused its ingredients to reach the nose and nasopharynx, they would not penetrate the cells where the action of the viruses would be taking place. Hence, Listerine would still be ineffective in this regard (Hornick 481-82; Parrott 904). If Listerine's ingredients were in a concentration strong enough to be effective and reached the infected cells in therapeutic strength and did and could penetrate the cells, the cells would be killed. This would be undesirable as it would destroy the protective covering of the lining of the nose and throat and so provide portals of entry for various bacteria (Hornick 482-83). IDF 70.

[13] *See also* CX 161B. Dr. John C. Krantz, a witness for respondent, wrote a textbook which lends support for this view. It states that the mechanical action of gargling will not deliver the gargled substance to the infected regions of the throat.

[14] Respondent claims that a test conducted by the FDA, RX 57, demonstrates that after gargling, some of the ingredients in Listerine are substantive with the membrane lining; that is, some binding between the oral cavity membrane and ingredients of Listerine occurred. In that test, each subject swished Listerine in his mouth for ten seconds, expectorated and rinsed his mouth twice with an alcohol solution. A substantially smaller percentage of Listerine was recovered in the second rinse than in the first. This finding led the ALJ to conclude that rather than demonstrate a binding effect the test results more probably "indicate that after fully expectorating the Listerine in the mouth, the first alcohol gargle got most of what remained so that the second gargle gathered a much smaller residual amount." IDF 152. The FDA did not offer the ALJ's interpretation as an alternate conclusion, and we see no reason to reject the FDA's conclusion. However, this test does not demonstrate that Listerine's *vapors* would have the same binding effect to the membrane in the nasophrynx as would Listerine in liquid form to the buccal membrane. More important, it does not demonstrate that Listerine would penetrate the tissue cells. In fact, respondent's own witness, Dr. Thomas McNamara, has testified that although Listerine may bind to the mucous membrane, it will not enter the tissue cells (Tr. 2343).

Even when asked to assume that Listerine can kill millions of germs on contact (*i.e.*, that Listerine has bactericidal properties), complaint counsel's experts did not alter their conclusions as to Listerine's lack of effectiveness. The following findings by the ALJ adequately summarize the views expressed by complaint counsel's witnesses:

> Bacteria play very little part in the common cold. Apart from viruses, cold type symptoms may be caused by the bacteria called Beta Hemolytic Streptococci or Group A Hemolytic Streptococci, more commonly referred to as a strep throat, and another organism somewhere in between a virus and a bacteria called microplasma [sic: mycoplasma] pneumonia. These agents may cause at most 5 to 10 percent of the occurrences of cold-like symptoms.

These ailments, however, must be treated with specific medicinal agents. In the case of strep throat, failure to treat properly may result in rheumatic fever, valvular heart disease and kidney infections, which are very serious to the point of being life-threatening. Microplasma pneumonia is a lingering ailment if antibiotics are not used. It would be inappropriate to treat patients with strep throat or microplasma pneumonia with Listerine or with anything other than the specific medications that should be prescribed (Gwaltney 380-81, 384-85, 438, 453-54; [Hornick] 486, 493-94; Proctor 610; Rammelkamp 767-71, 799-800; Sanders 836-40, 870; Parrott 896-97, 900-01, 918-19; [*See also*] Knight 1925-26, 2037-40, 2048). IDF 51.

Colds are not caused by bacteria. Bacteria in the oral cavity play no role in cold symptoms. The ability of Listerine to kill millions of germs on contact, therefore, is of no medical significance in the prevention, cure or treatment of colds or sore throats (Gwaltney 397, 453; Hornick 486, 488-89; Seal 551-53; Proctor 609, 616-18 [19 and 20]; Rammelkamp [775] 776-77; Sanders 836; Parrott 918-19; Kilbourne 1058; *see also* Knight 2048). IDF 58.

Colds are sometimes followed by secondary infections caused by bacteria known as secondary invaders. Instances are sinusitis and otitis media (middle ear infection) where drainage from the sinuses or middle ear is impaired by the cold, and bacteria which are already in those sites get the opportunity, because of the lack of drainage, to cause trouble. Another secondary infection is peritonsillar cellulitis. The ingredients of Listerine, however, would not reach the resting places of the secondary invaders. Listerine could not reach the sinuses, the middle ear or the deep crypts of the tonsils or adenoids or other deep-seated places where such bacteria might be. Listerine, therefore,

would be ineffective to prevent, cure or alleviate such secondary infections (Seal 552-54, 572; Proctor 614-15, 618; Rammelkamp 772-74, 811-12; Sanders 842, 844). IDF 71.

While Listerine kills millions of bacteria in the mouth, it also leaves millions. It is impossible to sterilize any area of the month, let alone the entire mouth. There are significant numbers of bacteria in various tissues, tissue folds and crypts which Listerine can't reach. For example, there is more flora in the crevices of the teeth than on the roof of the mouth. The bacteria grow back quickly or the voids are quickly replaced by other bacteria. The use of Listerine has only a transient effect on the flora (Hornick 488-89, 523-24; Seal 554; Proctor 620; Sanders 847-881-83). IDF 72.

To the extent that Listerine may kill millions of bacteria in the mouth, it would do so only ahead of the soft palate. This would have nothing to do with the throat, nose or the posterior pharynx. Consequently, the killing of germs in the mouth would have nothing to do with preventing, curing or relieving colds or coughs or cold symptoms (Hornick 483; Seal 554; Rammelkamp 777). The bacteria in the normal flora of the mouth play no role in the causation of colds or in the symptoms of colds. Thus, killing some of those bacteria would have no effect on the prevention, cure or symptoms of colds or coughs (Sanders 846-47, 879-80; And See Findings 48, 51, 52, 58 and 62, *supra*). IDF 73.

B. Respondent's Experts

Respondent sought to refute the prima facie case made by complaint counsel's experts with a battery of ten expert witnesses and numerous studies, clinical as well as nonclinical. Although several of these witnesses offered no

support for one or more efficacy claims or substantially qualified their views,[15] the general import of their testimony, taken as a whole, was that Listerine can reduce the number of colds one catches and ameliorate cold symptoms.

Nine of respondent's experts based their opinions to a substantial degree upon laboratory tests and/or clinical studies.[16] We have painstakingly reviewed each of the exhibits introduced for the purpose of establishing Listerine's effectiveness and conclude that they have little or no probative value for this proceeding. We have set forth at length in the Appendix our views as to each of these studies. Since these tests do not provide a sound basis for concluding that Listerine may have the claimed preventive or ameliorative powers, the persuasiveness of those witnesses who relied upon them is greatly diminished.

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[15] Dr. Noller offered no opinion as to Listerine's efficacy. He merely asserted that an ingredient of Listerine, menthol, acts as a nasal decongestant. Dr. Shirkey asserted only that Listerine could ameliorate some cold symptoms, Tr. 2607, 2616, 2628, 2667-69, 2674. Dr. Carson limited his evaluation of Listerine's efficacy to relief for coughing and nasal congestion, Tr. 3032-34, *See also* Tr. 3057. Dr. Knight on cross examination, "• • • retreated to the position that there were threads of evidence upon which one could put together a theoretical basis for the efficacy of Listerine, but that there were also threads of evidence to the effect that Listerine was ineffective (Tr. 2045-48)." IDF 143. Dr. Lasagna concluded that "if you gargle with Listerine regularly there is a chance you will feel somewhat better when you have a cold," Tr. 4154. Dr. Sadusk would recommend Listerine for relief of cold symptoms, but was not in a position to recommend it for prevention of colds and would not recommend it as a cold cure, Tr. 3211-12.

[16] Haggie, IDF 128; Knight, IDF 143-44; Noller, IDF 145; McNamara, IDF 146; *See also* Tr. 2306; (Dr. McNamara may have relied additionally upon tests admitted into evidence solely for the purpose of "showing what Dr. McNamara relied upon as a responsible official of respondent for purposes of considering the scope of an order to cease and desist should one be issued." IDF 148); Ritchie, IDF 155; Shirkey, IDF 164; Carson, IDF 167 and 182; Sadusk, IDF 184; Lasagna, IDF 190.

The tenth witness, Dr. John C. Krantz, Jr., apparently did not rely upon the exhibits in question. However, we accord his testimony little weight, because he was unaware of the quantities of Listerine which would reach the nasopharynx, (Tr. 1882) and his view that gargling with Listerine would be beneficial for a sore throat is contradicted by statements in his own textbook. (CX 161A and 161B, Tr. 1889-95.) [17]

In weighing the evidence we have taken into consideration the fact that the experts called by complaint counsel based their opinions on their general medical and pharmacological knowledge and, in some instances, on their experiences as clinicians. With the exception of Dr. Hornick, none of complaint counsel's witnesses examined the exhibits which respondent presented in support of its assertion that Listerine is efficacious. Failure to provide these witnesses with respondent's tests is inconsequential because, as we have set out in the Appendix, these tests lack probative value. Moreover, the experts called by complaint counsel are well versed in their fields, several having devotd their careers to the task of studying and treating respiratory diseases. If valid tests demonstrating Listerine's efficacy as a cold treatment had been conducted, we seriously doubt that such tests would have remained a secret to *all* of complaint counsel's medical and pharmacological experts.

This is not the first proceeding in which the Commission has had to choose between experts who based their views on their general medical and pharmacological knowledge

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[17] The ALJ noted that many of respondent's experts had financial ties to respondent. In view of the reasons we have expressed for placing little reliance on the testimony of respondent's witnesses, we need not consider the possible effect of their financial ties. Finally, in regard to Dr. Noller, although we agree with the ALJ that his testimony was not a model of clarity, we will attribute the ambiguities in his testimony solely to language difficulties.

and others who based their views at least in part on deficient studies. It is well established that the Commission has authority to rely on the testimony of the former. *E.g., J. E. Todd* v. *FTC*, 145 F.2d 858 (D.C. Cir. 1944); *Fulton* v. *FTC*, 130 F.2d 85 (9th Cir. 1942), *cert. denied*, 317 U.S. 679 (1942); *Aronberg* v. *FTC*, 132 F.2d 165 (7th Cir. 1942); *Justin Haynes & Co.* v. *FTC*, 105 F.2d 988 (2d Cir. 1939).

C. Consumer Satisfaction

Respondent claims that Listerine's cold-fighting ability is demonstrated by the fact that vast percentages of the population consider Listerine Antiseptic to be effective for colds and sore throats "because a consumer's image of a product and his propensity to purchase it repeatedly is substantially dependent upon his experience with it." (RB 74-75, RRB 20.) The record does show that a consumer's "experience" with a product affects his image of the product and his propensity to purchase it. (Tr. 1199-1200, 1673, 3389-90, 3402-03, 3436-38, 3455-56.) The record also demonstrates that many consumers think Listerine is effective for colds and sore throats. (*Infra*, Sec. V A2.) But this evidence does not, as respondent contends, prove that Listerine works. The flaw in respondent's reasoning is that a consumer may *perceive* a product to be effective when, in reality, it has no efficacy. In short, he may repeatedly purchase the product out of ignorance. A cold is a self-limiting disease, and therefore a cold sufferer who takes Listerine may wrongly attribute the termination of the cold episode to his gargling with Listerine. (Tr. 2039.) Clearly, unless the patient can perform well-controlled clinical tests, he is not in a position to know whether his improvement was attributable to the medication.

In addition, the cold-sufferer who takes Listerine is likely to experience the placebo effect, the phenomenon in which the patient who takes a medication feels better because he thinks he should feel better even though the product has no genuine therapeutic value. (Appendix at 6A.)

The Commission cannot accept as proof of a product's efficacy a psychological reaction stemming from a belief which, to a substantial degree, was caused by respondent's deceptions. (*Infra*, Sec. V A2.)

Since there may be a divergence between what the user *thinks* the product will do for him and what the product actually does (or does not do), evidence of consumer beliefs has little probative value for determining whether Listerine is effective for colds or sore throats.

In support of its contention that consumer satisfaction constitutes persuasive evidence of product efficacy, respondent cites *Evis Mfg. Co.* v. *FTC*, 287 F.2d 831 (9th Cir. 1961), *cert. denied*, 368 U.S. 824 (1961). That case does not stand for so broad a rule. In *Evis* the court merely held that tests conducted by experts who failed to follow the manufacturer's instructions did not constitute substantial evidence of the challenged product's lack of efficacy, and that the Commission erred in failing to consider testimony of user witnesses (many of whom were experts). The court did not hold that evidence of consumer satisfaction is persuasive of a product's efficacy, but merely that the Commission must consider such testimony. In the case at hand we have taken into account the fact that survey evidence shows that many consumers consider Listerine to be effective for colds and sore throats, and for the reasons discussed above, we conclude that this evidence does not demonstrate that Listerine has any efficacy in the prevention or treatment of colds or sore throats.

To summarize, after carefully reviewing the testimony of the experts called by both sides and of the studies admitted into evidence in support of respondent's efficacy claims, we must conclude that the preponderance of the evidence [18] demonstrates that, contrary to respondent's

[18] This Commission has consistently used a preponderance of the evidence test in evaluating the truthfulness of product claims.

advertising claims, the use of Listerine, as directed, will not prevent or cure colds or sore throats or ameliorate cold symptoms. Accordingly, respondent has violated the Federal Trade Commission Act.

Respondent asserts that in evaluating a drug's effectiveness we must follow, instead, the "substantial evidence" standard set forth in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 355(d), which the Secretary of Health, Education and Welfare must apply when he considers a new drug application. We cannot agree. Of course, we would take into account an evaluation by the Secretary that substantial evidence supported the claimed efficacy, but we find no indication in either the Federal Food, Drug and Cosmetic Act or our own Act that Congress intended that we automatically defer to the Secretary's determinations.

However, the question of which standard to apply is not crucial to the outcome of this proceeding because respondent has not met even the more lenient standard prescribed by § 355(d). That section requires that an application for a new drug be denied if "there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof." Sec. 355(d) defines "substantial evidence" as: "evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof."

The FDA's relevant regulations specify that "essentials of adequate and well-controlled clinical investigations" include the necessity "to minimize bias on the part of the subject and the observer." Sec. 314.111(a)(5)(ii)(a)(3). The Supreme Court has noted that "[L]ower courts have upheld the validity of these regulations, and it is not disputed that they express well-established principles of scientific investigation." *Weinberger* v. *Hynson, Westcott & Dunning,* 412 U.S. 609, 619 (1973). As is discussed in the Appendix, respondent did not take adequate precautions to minimize bias on the part of either the subjects or the investigators in its clinical tests of Listerine. Thus, respondent has not satisfied even the substantial evidence standard.

IV. *The Prior Proceeding*

In 1940 the Commission issued a complaint challenging cold and sore throat claims for Listerine which it later dismissed "• • • without prejudice to the right of the Commission to institute further proceedings should future facts so warrant." 38 F.T.C. 730 (1944). Respondent argues that the complaint in the present proceeding must be dismissed because complaint counsel have not come forward with "future facts." Respondent has misconstrued the 1944 order. In previously expressing our position on this question, *Warner-Lambert Company,* 82 F.T.C. 749, 752 (1973), we stated:

> The future facts which would warrant a new proceeding upon which the Commission's decision to issue a complaint are based and, as we have previously held, respondent is precluded from inquiring into our mental processes leading up to that decision. *In the Matter of the Seeburg Corporation,* 70 FTC 1818.

Respondent also contends that the Commission relied upon the Reddish Study in dismissing the 1944 complaint, and therefore the ALJ's findings relating to the deficiencies in the Reddish Study "constitute an impermissable [sic] relitigation of matters long ago settled." (RB 67.) Although in his separate statement Chairman Freer said that the Reddish tests

> • • • afford some basis for the respondent's conclusion that the use of Listerine in practice actually mitigates or shortens colds and their complications,

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Respondent also contends that (RB at 39): "• • • in the case of old (pre-1938), well-established drugs such as Listerine Antiseptic, Congress further concluded that their history of consumer acceptance was in itself substantial evidence of efficacy and established for those drugs a presumption of efficacy and an exemption from the preclearance procedures established in the 1962 Drug Amendments." 21 U.S.C. § 321(p); *see, Weinberger* v. *Hynson, Westcott & Dunning, Inc., supra* at 614.

the Commission's order belies respondent's assertion that the validity of the Reddish tests was settled in the prior action. Had it been of the view that the Reddish tests proved that Listerine was effective for the treatment of colds, the Commission presumably would have dismissed the complaint with prejudice. Instead, it dismissed the complaint "without prejudice to the right of the Commission to institute further proceedings should future facts so warrant." [19] The dismissal of a Federal Trade Commission

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Neither § 321(p) nor the cited case suggest that a "history of consumer acceptance was in itself substantial evidence of efficacy" or that old drugs are presumed to be efficacious. On the contrary, Congress viewed his grandfather clause merely as a "transitional" provision for implementing the 1962 Drug Industry Act (S. Rep. No. 1744, 87th Cong., 2nd Sess., Part II at 7-8 1962). FDA was given the statutory mandate "to review all marketed drugs for their therapeutic efficacy, whether or not previously approved • • •" *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 614 and, as the Supreme Court has noted, "[i]n May 1972 FDA adopted a procedure for determining whether particular OTC products, not covered by NDA's are safe products, not ineffective, and not misbranded." *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 650 (1973). Thus, no presumption of efficacy arises from the fact that Listerine has been on the market since 1879.

[19] In explaining his reason for so doing Chairman Freer said:

In my opinion the issues raised by paragraphs 3, 4 and 5 of the complaint involve in their determination the adoption of one of two opposing medical or scientific opinions in respect to which our decision would settle only the legal right of the respondent to continue to make the challenged representations and not the underlying controversy. Should we so resolve those issues (both as to interpretations of the advertisements and as to the medical or scientific opinions) as to require an order to cease and desist, the respondent can, and no doubt will, appeal. In that appeal, however, the door will be closed to any weighing of the evidence by the court, since "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Should we, on the other hand, so resolve the several issues of interpretation of language and of medical or scientific opinion in such a manner as to dictate an

action "without prejudice" does not work an estoppel to a future determination of the merits of that action. *Hastings Mfg. Co.* v. *FTC*, 153 F.2d 253 (6th Cir. 1946), *cert. denied*, 328 U.S. 853 (1946).

V. *The Remedy*

A. Corrective Advertising

The ALJ imposed on respondent the duty to engage in corrective advertising. Specifically, for two years respondent shall not disseminate any advertisement for Listerine unless the advertisement clearly and conspicuously states: Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats.

1. Authority to Issue a Corrective Advertising Order

The Commission has previously noted its authority to issue corrective advertising orders.[20] It also has ordered

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outright dismissal of the complaint, the respondent might, and probably would, raise the defense of *res adjudicata* to any proceeding which the Government might decide to institute at some future time when and if the medical profession learns more about and reaches a greater degree of unanimity concerning the cause of and cure for dandruff, bad breath and colds or sore throats.

Hence, while not unmindful of the forcefulness of the arguments on the one hand for an order to cease and desist and on the other for outright dismissal, I feel that a *dismissal without prejudice* is warranted by the probability (almost certainty) that neither an order to cease and desist nor an outright dismissal would settle with finality or help greatly in the final settlement of the *underlying medical and scientific controversies*, although either disposition would be interpreted as having settled these matters once and for all. 38 F.T.C. at 741-42.

[20] *Firestone Tire & Rubber Company*, 81 F.T.C. 393, 464-74 (1972) *aff'd.* 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112

affirmative relief to dispel the lingering effects of misrepresentations [21] and has accepted numerous consent orders which require corrective advertising.[22] In concluding that the Commission's statutory mandate encompasses the authority to order corrective advertising, we have been mindful of the wide latitude courts have afforded the Commission in fashioning appropriate relief.[23] Illustrative of

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(1973); *ITT Continental Baking Company, Inc.*, Dkt. 8860 (Oct. 19, 1973 [83 F.T.C. 865]) at 31-32, appeal docketed No. 75-4141, 2d Cir., July 11, 1975; *Campbell Soup Company, et al.*, 77 F.T.C. 664, 668 (1970).

[21] *Travel King, Inc.*, Dkt. No. 8949 (Sept. 30, 1975 [86 F.T.C. 715]).

[22] Matsushita Electric of Hawaii, Inc., 78 F.T.C. 353 (1971); *Sugar Information, Inc.*, 81 F.T.C. 711 (1972); *ITT Continental Baking Co., Inc.*, 79 F.T.C. 248 (1971); *Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972); *Shangri-La Industries* 81 F.T.C. 596 (1972); *Pay Less Drug Stores Northwest, Inc.* 82 F.T.C. 1473 (1973); *Boise Tire Co.*, C-2425 (July 16, 1973); *Lens Craft Research and Development Co. et al.*, D. 8950 (Sept. 4, 1974 [84 F.T.C. 355]); *Wasem's Inc.*, C-2524 (July 23, 1974 [84 F.T.C. 209]).

[23] We said in *Firestone*, 81 F.T.C. at 467-68:

The courts have repeatedly recognized that to deal with the ever expanding scope of unfair and deceptive practices, the Commission must be permitted wide latitude in fashioning effective relief, In *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946) the Court stated:

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair and deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Again in *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952) the Supreme Court reiterated this view:

Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal

this wide latitude are orders requiring divestiture, *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); ordering compulsory licensing of a patent on a reasonable royalty basis, *Charles Pfizer & Co., Inc.* v. *FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); limiting the purchases of certain products between respondents, *Luria Bros. & Co., Inc.* v. *FTC*, 389 F.2d 847 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968); and requiring affirmative disclosures in advertisements and on products, *J. B. Williams Company* v. *FTC*, 381 F.2d 884 (6th Cir. 1967), *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18 (5th Cir.,

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with problems in the general sphere of competitive practices. (Footnote omitted.)

The court pointed out that if the Commission is to carry out the objectives envisioned by Congress "it cannot be required to confine its road block to the narrow lane the transgressor has traveled," but must be able "to close all roads to the prohibited goal." *Ruberoid, supra* at 473.

Such wide latitude in determining remedy has been deemed necessary so that the Commission can effectively carry out the statutory policy of the Federal Trade Commission Act to protect consumers and maintain competitive vigor in the marketplace. As the Ninth Circuit stated in *Carter Products, Inc.* v. *FTC*, 268 F.2d 461, 498 (9th Cir. 1959):

Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting *the means* of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence.

The Seventh Circuit recently reflected this same view in *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1,24 [sic] (7th Cir. 1971):

The Commission must be accorded latitude in forming its orders for "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413, 78 S. Ct. 377, 379, 2 L. Ed. 2d 370 (1958)."

1960), *Ward Laboratories, Inc.* v. *FTC*, 276 F.2d 952 (2nd Cir. 1960), *cert. denied*, 364 U.S. 827 (1960), *Waltham Precision Instrument Co.* v. *FTC*, 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964).

Simply stated, the common thread linking these cases is the principle that the Commission has authority to order the relief necessary to adequately protect the public from the effects of a law violation. Thus, if a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

Respondent claims that *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), rejected the proposition set forth in *Firestone* that the Commission has authority to terminate continuing injury to the public.[24] Respondent has misread

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[24] In considering the Commission's authority to issue an order designed to terminate the continuing effects of a deceptive advertisement, the Commission said in *Firestone:*

ANA and respondent contend that a corrective advertising order is retrospective and therefore unlawful because it seeks to dissipate the effects of illegal conduct. In our view, however, such an order is quite obviously not retrospective if its purpose and effect is to terminate *continuing* injury to the public. This continuing injury may be in the form of lingering effects which a misrepresentation may have on consumers' minds or in the form of a lessening of competitive vigor in the marketplace due to the deceptive practices. Under such circumstances, the appropriate relief is that which will terminate the continuing injury to the public. 81 F.T.C. at 470.

Heater. In that case the court simply held that the Commission lacked authority to order a respondent to refund to customers monies obtained from them through deceptive practices. Neither the holding in *Heater* nor the court's rationale support respondent's assertion that the Commission lacks authority to order corrective advertising. In fact, the *Heater* court explicitly distinguished the Commission's order in that case from a corrective advertising order:

> Our holding denies retroactive impact to a Commission decision, at least insofar as private rights and liabilities are involved • • •
>
> We recognize that divestiture and corrective advertising orders support the Commission's position that it has power, in order to remedy the continuing effects of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal. Moreover, we recognize that there is no economic difference in the impact of those orders and a restitution order—in each case the offender loses the benefits of money expended in reliance on the legality of conduct later found illegal. Nevertheless, the two cases must be treated differently because Congress, out of reasonable fair notice consideration, chose to leave the cure of private injuries caused by violations of the Act to whatever common-law remedies existed. 503 F.2d 321, 324-25 n. 13.

We thus conclude that *Heater* is no authority for the contention that the Commission lacks authority to issue a corrective advertising order to dispel the continuing effects which a deceptive advertisement has on the consuming public.

Moreover, the continued sale of a product under false pretenses is itself a violation of the FTC Act,[25] which, in the case of lingering false beliefs created by discontinued advertisements, can be remedied only by dispelling the false belief.

2. Applying the Corrective Advertising Standard to the Case at Hand

The record demonstrates that respondent's deceptive advertisements have created false beliefs which are likely to continue to exist and influence consumer decisions to purchase Listerine.

Consumer Beliefs. Market research reports, known as "Product Q" reports,[26] which were commissioned by respondent over a seven-year period at a cost of over $100,000, demonstrate that the majority of those surveyed believe that Listerine is effective for colds and sore throats. Specifically, the percentage of those persons surveyed who rated Listerine as "one of the best" in the category "effective for colds and sore throats" rose from 43 percent in 1963 to 59 percent in 1971, averaging 53.8 percent for the entire period. This figure includes the entire population surveyed. Listerine users as well as nonusers. 53.8 percent is itself a substantial portion of the survey population, but that figure probably understates the percentage who believes Listerine has some effect on colds and sore throats because it includes only those who believe that Listerine is "one of the best" mouthwashes for that characteristic. It does not include responders who rated Lis-

[25] *J. B. Williams Company* v. *FTC*, 381 F.2d 884 (6th Cir. 1967); *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18 (5th Cir. 1960); *Ward Laboratories, Inc.* v. *FTC*, 276 F.2d 952 (2nd Cir. 1960); *Waltham Precision Instrument Co.* v. *FTC*, 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964).

[26] For discussion of the nature of Product Q reports see IDF 222-227.

terine as "very good," "good" or "fair" for the category "effective for colds and sore throats." (IDF 236.)

Although the data for the precoded category "effective for colds and sore throats" was not refined into more specific beliefs, the ALJ concluded that this category encompasses prevention, amelioration and cure claims, (IDF 230.) On the one hand respondent takes issue with the ALJ's interpretation, but on the other hand, it appears to argue, in support of its amelioration and partial prevention claims, that consumers perceive Listerine to be an effective remedy. (RB 74-75.) More important, the record adequately supports the conclusion that "effective for colds and sore throats" includes prevention and amelioration beliefs. (Tr. 1553.) However, on the basis of the record before it, the Commission is unconvinced as to cure beliefs. We thus find that a substantial portion of the consumer public holds prevention and amelioration beliefs but we can draw no conclusion about cure beliefs.

Effect of Listerine Advertisements on Consumer Beliefs. Respondent has advertised Listerine to consumers as a cold remedy since 1921. Not only have Listerine packages and labels contained cold efficacy messages, but also respondent has spent large sums to advertise Listerine on television and in print media as effective for colds and sore throats. (IDF 219-220.) Common sense indicates that this extensive cold efficacy advertising campaign (including labels and packages) has contributed substantially to Listerine cold and sore throat efficacy beliefs and that current advertising performs the dual functions of maintaining beliefs created by prior advertisements and creating beliefs in consumers entering the market.

Record evidence supports what common sense suggests:

(1) Dr. Peter Rossi, a witness for complaint counsel, testified that (Tr. 1451):

> Indeed, the evidence here is consistent with the idea that it is the advertising of Listerine as registered in

the memories of consumers which produces the distinctive patterning of the brand image for that brand; and, indeed, the advertising for Micrin does the same thing for Micrin, but certainly it is clear that the advertising for Listerine dóes its job for that brand.

(2) Dr. Alvin A. Achenbaum, a witness for respondent, stated (Tr. 3439-40):

> • • • insofar as the users of a brand are concerned that advertising for a well-established product like Listerine—that probably the advertising has the effect of reminding people of information or their belief or about the brand so that at the time at which they make a purchase—that hopefully that brand will come to their mind as opposed to perhaps some other brand which is out there trying to advertise and have some effect upon their point of view as well. So I would say that, in that sense in the life cycle, it has a reminding effect.
>
> Now, there are always new people coming into the market. I mean, people grow up and form households who are not users, and, to some degree, the advertising could affect their belief structure.

See also testimony of Dr. Frank Bass. (Tr. 1607-12, 1617-21.)

(3) The benefit of spending vast sums on cold efficacy advertising has not escaped respondent's notice. A Product Q report commissioned by respondent stated:

> Listerine continues to be first on most measures and it continues to grow while Scope remains a distant second; its performance relatively static. However, despite this one sided picture, comparable numbers of respondents claim to recall "a lot" of advertising for each brand. With this dimension constant and Listerine well ahead of Scope on everything else, it would

> appear that *the quality of Listerine's advertising and/or its media plan are making a vital contribution to the brand's success.*
>
> *Also, there is a very close relationship between Listerine advertising registration and the brand's image.* (Emphasis added) CX 65E-F.

Moreover, a letter from respondent to the J. Walter Thompson Co. stated that a cold efficacy commercial, "• • • helped generate all-time high brand shares." (CX 109A.)

(4) Apparently, Listerine's three leading competitors were not advertised as colds remedies. (Tr. 1595, RB 85.) The Product Q data reveals that over 60 percent of responders in 1967 and 1968 believed Listerine was effective for colds and sore throats, whereas fewer than 20 percent attributed that quality to Listerine's three leading competitors." (CX 80Z-11.) Although this empirical data showing a three-fold differential in belief levels does not prove that Listerine cold efficacy advertising substantially affected consumer beliefs, it is consistent with the aforesaid views expressed by experts and respondent.

Respondent argues that consumer beliefs result from actual experience with the product rather than from the advertising. We have previously concluded that Listerine has no efficacy for colds and sore throats. We further noted that a cold is a self-limiting malady, and therefore a cold sufferer may wrongly attribute the termination of the cold episode to Listerine. In fact, the only source of con-

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[37] In commenting on the low scores of Listerine's competitors, Dr. Bass said "and I would expect that there would be levels of belief for these other brands of about the level that we observe in the absence of advertising." Tr. 1595. He suggested that the low percentages which the other mouthwashes registered in the absence of colds advertising could have resulted from color, image of antiseptic properties and perhaps word of mouth. Tr. 1596.

sumer "satisfaction" is the placebo effect. Although the placebo effect probably causes some Listerine users to think the mouthwash works, the record does not establish it as the exclusive or even major source of the belief.

Respondent further incorrectly contends that a corrective advertising order cannot properly be issued unless the Commission finds that advertising was the sole source of the belief. We have previously ordered affirmative relief to correct a false impression created merely "in part through respondent's own efforts." *Waltham Instrument Co.*, 61 F.T.C. 1027, 1049 (1962) *aff'd.* 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964). To the extent that dicta in *Sun Oil,* Dkt. 8889 (Aug. 19, 1974 [84 F.T.C. 247]), an unappealed initial decision adopted by the Commission, could be construed as supporting a sole-source standard, that opinion does not reflect the views of this Commission. The Commission's mandate is to eliminate the effects of false advertising, and a sole-source standard would effectively bury a remedy which is vital to the achievement of that goal.

Persistence of the False Beliefs. The record demonstrates that long after Listerine cold efficacy advertising ceased, a substantial proportion of the public would continue to believe in Listerine's efficacy for the treatment and prevention of colds and sore throats. Dr. Bass testified that cold efficacy belief levels would continue at the 1971 rate (59 percent) for about two years after colds advertising ceased and would remain high even *after* five years. (Tr. 1560-61, 1611.) It is Dr. Bass' view that consumer beliefs tend to continue once they are created and that after a belief is created it lasts much longer than the memory of the copy points of the ads that created the belief. (Tr. 1556-57.) Dr. Rossi concluded that the stability of Listerine's image is quite impressive, and that in the absence of colds advertising consumer beliefs would decline at *no greater* a rate than 5 percent a year. (Tr. 1433, 1469-72.) At that maximum rate of decline, belief levels would still

register over 30 percent ten years after the advertising ceased. Moreover, the Product Q data reveals that consumer beliefs about Listerine's effectiveness against colds and sore throats were practically the same during the portions of the year when respondent engaged in colds advertising as during the rest of the year. (CX 159D.)

As was previously discussed (*supra,* Part II), the record shows that respondent's advertisements and labels made the challenged claims at least as late as 1972. Thus, we conclude that a substantial proportion of the consuming public will retain the beliefs in issue well into the 1980's.

Materiality of the False Beliefs. The ALJ found that "[t]he belief that Listerine is effective for colds and sore throats is a determining factor in a significant number of consumers' decisions to purchase Listerine." (IDF 244(a).) The testimony of Dr. Rossi supports this conclusion (Tr. 1455, 1460) as does empirical evidence. According to Product Q data, 37.5 percent of those interviewed over a seven-year period said that "effective for colds and sore throats" was "extremely important" in their selection of a mouthwash. (CX 159A.) This tabulation did *not* include those for whom "effective for colds and sore throats," was "very important," "somewhat important," or "fairly important." Thus, although 37.5 percent is in itself substantial, it probably does not fully reflect the extent to which cold efficacy beliefs affect purchasing decisions.

3. The Nature of the Corrective Advertising Order

In view of the foregoing findings that respondent's advertisments substantially contributed to the development and maintenance of the belief that Listerine is effective for the prevention and treatment of colds and sore throats, that a substantial portion of the population will continue to hold this belief well into the 1980's and that this belief plays a material role in purchasing decisions (thereby in-

juring both consumers and competition), we conclude that an order merely requiring cessation of the deceptive advertising would not afford the public adequate protection. The lingering false belief must be dispelled, a task which requires corrective advertising.[28]

The ALJ's order, which requires respondent to include a corrective message in all advertising for two years, may not accomplish this task. If respondent chose not to advertise during the two-year peeriod (or to do a miniscule amount of advertising) the corrective message would not adequately reach the public and the false beliefs would live on. To avert this possibility we shall order respondent to include the corrective message [29] in all Listerine advertising until it has expended an amount on such advertising equal to its average annual Listerine advertising budget for the ten-year period of April 1962 to March 1972 (as set forth in CX 44). A corrective advertising campaign of this scope should adequately dispel the lingering beliefs.

In this proceeding we cannot determine in advance with computer-like precision the minimum amount of corrective advertising which will dispel the otherwise continuing beliefs at issue. However, in ordering the relief which the public interest requires, it is the duty of a tribunal to exercise its best judgment to predict the relief which is essential. As the Supreme Court has recognized, the fashioning of appropriate affirmative relief necessarily "* * * involves predictions and assumptions concerning future economic

[28] The ALJ justified the corrective advertising order on the additional ground that future representations of Listerine as a germ killer would automatically remind the public of false colds claims (IDF 248). We need not consider at this time this additional rationale.

[29] Since the record does not demonstrate that consumers hold cure beliefs, we have modified the message to read:

Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.

and business events." *Ford Motor Company* v. *United States*, 405 U.S. 562, 578, (1972).[30] We see no reason why different considerations should apply when drafting a corrective advertising order.

4. Other Objections to a Corrective Advertising Order

Respondent contends that a corrective advertising order would raise First Amendment questions. However, it has not disputed the commercial nature of its advertisements. As we noted in *Firestone*,[31] courts have repeatedly held that regulation of false commercial advertising is constitutional. In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389 (1973), the Supreme Court articulated a balancing test which must be applied to the regulation of truthful commercial speech:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Assuming that the same considerations apply when mandating commercial speech as when proscribing it, we conclude that the corrective advertising order in this case is a valid limitation on economic activity because it is designed

[30] The Court upheld a lower court's determination that to restore and encourage competition, Ford must, *inter alia*, be enjoined from manufacturing spark plugs for ten years, be ordered for five years to buy one half its spark plug requirements from the divested plant under the "Autolite" name and refrain from using its own name on spark plugs during that five-year period, and be ordered for ten years to sell to its dealers at prices not less than the minimum suggested jobbers' selling price.

[31] 81 F.T.C. at 471-72.

to dispel the continuing effects of illegal commercial activity.[32]

Respondent also claims that a corrective advertising order is a punitive measure because it may adversely affect the product's consumer franchise as a breath freshener. The corrective advertising order that we are issuing is intended solely to dissipate the effects of respondent's deceptive representations. In dispelling these beliefs, respondent may impair a portion of its breath-freshener franchise, but the fact that the remedy may have some harsh consequences does not render it punitive. As the Commission said in *Firestone*, 81 F.T.C. at 469:

> The fact that the remedy may be deemed by the court to have severe consequences to the respondent does not in itself render the order punitive if the order is also deemed a "needful public precaution." *All-State Industries of North Carolina, Inc.* v. *FTC*, 423 F.2d 423, 425 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970).

B. Objections to Part II of the ALJ's Order

Part II of the ALJ's order requires respondent to cease representing that Listerine *or any other mouthwash product* is effective for colds. Respondent objects to the inclusion of other mouthwashes on the ground that the complaint challenges solely the efficacy of Listerine.

Respondent has spent a considerable sum advertising Listerine as a cold remedy for decades. Presumably, it found this representation to be profitable. Respondent thus has an incentive to formulate a new mouthwash which it could advertise as a cold remedy. In view of our conclusion that the act of gargling does not deliver a mouthwash to

[32] *See also Bigelow* v. *Virginia*, 95 S. Ct. 2222, 2235 (1975) where the Court again noted the distinction between advertising related to activities the state may legitimately regulate (including fraudulent or deceptive advertising (2235-36)) and advertising not so related.

the critical areas of the body, we question whether any mouthwash would be effective for colds or sore throats. Thus, by limiting the order to Listerine we would set the stage for a replay of the instant proceeding, the only difference being the name of the mouthwash. To avert this prospect we must, in the exercise of our fencing-in authority, include all mouthwashes within the coverage of Part II of the order. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-395 (1965).

Of course, if respondent were to develop a mouthwash which was effective for colds or sore throats, it could petition to modify the order, as provided by Section 3.72 of the Commission's rules.

Appendix

The ALJ determined that the following exhibits do not support respondent's efficacy claims. After a thorough review of each exhibit, we concur in the ALJ's conclusion that they lack probative value, but as explained below, in some instances we have a different reason for finding that a particular exhibit has no value.

1. *RX 40-43:* We agree with IDF 134-142 (the last citation to Dr. Knight's testimony in IDF 142 should be "Knight 1982").

2. *RX 44:* We agree with IDF 198.

3. *RX 46:* As described in IDF 45, the procedures used in the tests discussed in RX 46 render those tests useless in this proceeding.

4. *RX 47:* This is a report of a test in which the drug was administered to test rabbits. In addition to the reasons advanced by the ALJ for according little value to this test (IDF 174-176) we emphasize the following:

Dr. Carson stated that studies in animals are simply preliminary studies and that clinical tests are necessary

to draw conclusions about the effect of a drug in man (Tr. 3576). Moreover, the probative value of the test is further reduced by the dissimilarity between the method by which the drug was administered to the rabbits and the method by which Listerine is administered to humans. Furthermore, even assuming *arguendo* that this test demonstrated that ingredients of Listerine can have a decongestant effect, Dr. Carson did not satisfactorily establish that an effective dose of these ingredients would reach the critical areas of the respiratory tract (Tr. 3572-73).

5. *RX 48:* The systemic administration of the drug renders the test valueless. We note, however, that since we place no value in RX 47, we need not reach the ALJ's conclusion that RX 47 contradicts RX 48. (IDF 178.)

6. *RX 50:* We agree with IDF 173.

7. *RX 53:* We agree with IDF 149.

8. *RX 55:* We agree with IDF 150.

9. *RX 56:* This was an in vitro test conducted in hamster cheek tissue. Assuming *arguendo* that hamster cheek tissue closely resembles tissues in the human nasopharynx, this test has little value because, as the ALJ noted, the amount of ingredients retained was not quantified. (IDF 151.)

10. *RQ 57:* See opinion at 15 [pp. 1494-1495 herein].

11. *RX 60, 61, 63 and 64:* We agree with IDF 153.

12. *RX 65-68:* We agree with the ALJ that the tests discussed in these exhibits deserve little weight in this proceeding. RX 67, a document to which Dr. Ritchie, the coauthor fully subscibes (Tr. 2404) stated, in essence, that the results of the tests described in RX 65, 66, 67 and 68 are not statistically significant:

> Severe colds are usually those in which the viral stage of about three days duration is succeeded by a more prolonged bacterial stage, believed to be due to the multiplication of the native nasopharyngeal bacteria. Such colds can be prevented by a six-months course of autogenous bacterial vaccines given beforehand, or they can be aborted and rendered innocuous by early antibiotic treatment. The evidence submitted, although strong, does not reach statistical significance.

These tests, therefore, have little probative value. Respondent argues that the above reference to the statistical insignificance of the tests does not encompass so-called "subsequent tests" described in RX 66. However, RX 66 was printed in 1958. RX 67, which was published in 1969 (Tr. 2389), was offered into evidence as a summary of Ritchie's views over the period 1958-1969. Thus, we cannot see how the test discussed in RX 66 could be regarded as a "subsequent" test which Dr. Ritchie somehow failed to consider in making the assessment in RX 67 that "the evidence • • • does not reach statistical significance."

We also accord these tests little weight because the record does not show that the results obtained with a bacteriostatic substance (which purportedly maintains the bacteria population at a reduced level) carry over to a bactericidal substance, particularly since bactericides do not prevent the bacteria from growing back to their previous strength or greater. *See* IDF 154.

13. *RX 69-71:* We agree with ALJ at IDF 199-201.

14. *RX 73:* The ALJ's finding (IDF 205) that the machine did not measure the quantities of any ingredient is sufficient reason to accord this test little weight, and therefore, we need not reach other reasons he offered for finding the exhibit valueless.

15. *RX 75:* We agree with IDF 207-209. In IDF 208 the ALJ noted the prospect that the panelists may have exercised bias in favor of Listerine. Although the panelists may have been biased, we need not reach this issue because

the test has little probative value for the other reasons discussed at IDF 207-209.

16. *RX 97:* We agree with IDF 168-172.

17. *RX 108:* In 1935, Dr. Oscar B. Hunter performed tests which he claimed showed that gargling is an adequate mechanism for bathing the crypts of the tonsils with Listerine. *See* RX 108 p-r, z-z26. However, he also testified that Listerine would not get into *all* of the crevices of the mouth, RX 108 z-96. We have resolved this apparent inconsistency in his testimony in favor of his assertion that Listerine would not reach all the crevices because this is the view which is consistent with the testimony of experts for both sides in this proceeding, *e.g.*, Seal Tr. 554; McNamara, Tr. 2342.

Clinical Studies of Listerine

Respondent contends that two clinical studies, the St. Barnabas and Reddish studies, demonstrate the efficacy of Listerine for colds and sore throats. After a careful review, we must conclude that the design and execution of these tests heavily biases the results in favor of Listerine, and therefore, the results cannot support respondent's efficacy claim.

1. *The St. Barnabas Test*

Students in an elementary school and a high school were randomly selected to participate in this study which spanned four years (the high school was dropped at the end of the third year). During the first two years, the participating students were assigned either to the treatment group, which gargled with Listerine twice a day, or to a control group which used no mouthwash at all. (RX 81, Tr. 2789-90.) During the last two years the control group gargled with water colored to resemble Listerine's amber hue. (Baron Tr. 2746-47). Since it did not have Listerine's taste or odor, the ALJ concluded that this amber-colored

water was not a true placebo, IDF 87, and that the absence of a true placebo biased the test results in favor of the tested agent, Listerine. We agree with this conclusion. As the ALJ noted:

> People who are given medication for an ailment frequently feel better because they think they should, even though the product has no therapeutic value. There are very few people who are not susceptible to this phenomenon (Seal 562, 566; Proctor 659; Rammelkamp, 785). As Dr. Proctor testified, "Even with severe pain you can substitute sugar for morphine and about 30 percent of the people will be relieved of their pain." (Tr. 659.) And as Dr. Rammelkamp explained, "[Y]ou see paralysis even stopped where you just give an injection of salt water." (Tr. 783.) This is known as the placebo effect. The placebo effect is always present when medication is taken (Shirkey 2635). (IDF 81.)

In order to determine whether the product has efficacy, the bias of the placebo effect should be removed. This bias can be neutralized by "blinding" the participants, *i.e.*, dispensing to the control group a placebo which simulates in taste, smell and appearance the product being tested. This practice of blinding the control group through the use of a placebo is a generally-accepted procedure today. (*See* Knight 2051; Bogarty 3072-73, 3117; Shirkey 2655-56; Jawetz 3698-99, 3838-39; Wehrle 4011; Lasagna 4126, 4131). Use of an adequate placebo becomes even more important where the evaluation of symptoms involves subjective judgments (Wehrle 4038). The record demonstrates that a cold is a self-limiting infection, and evaluation of cold symptoms tends to be quite subjective (Gwaltney 407; Hornick 476, 497, 499; Seal 549).

We are not requiring in this case that the placebo duplicate the taste, smell, texture, color, etc. of the tested product. There may well be degrees of simulation short of du-

plication which would neutralize the placebo effect.[1] However, the use of caramel-colored water was patently inadequate.

Respondent urges that the absence of a true placebo can be counterbalanced by factors which tend to reduce the impact of the placebo effect, such as conducting the study over a long period of time, permitting the use of concomitant medication, and maintaining the "blindness" of the examining physician—precautions which respondent claims were taken in the St. Barnabas study. Perhaps in some drug studies other factors could compensate for the absence of a placebo but so many uncertainties permeate the St. Barnabas test that we cannot place any reliance in it. For example, it is unclear whether the examiner was properly blinded. We note that blinding the examiner is not merely a device for counterbalancing the absence of a proper placebo; it is essential that a properly administered test avoid bias on the part of the investigator. Whatever bias he may consciously or subconsciously possess can be neutralized by preventing him from knowing which subjects used the purported medication and which received no medication. In this sense, the examiner is "blinded." The ALJ aptly summarized the necessity for properly "blinding" the examiner (at IDF 83):

> Another bias that must be avoided is that of the investigator who is recording the results as narrated to him by the subjects or as observed by him when he conducts his examination. Every investigator has his own

[1] Dr. Vernon Knight, a witness for respondent, identified an alternative which may have proved adequate: A new study would have to be of the "double blind" type. This might be arranged by completely avoiding the use of the word "Listerine." Listerine colored another color or conceivably flavored slightly differently as well could be compared with a colored, flavored, 25% alcohol solution. A third group could be given a non-alcoholic, non-germicidal solution of a different color and flavor. CX 162 at 8.

> biases. It is important that the investigator not know whether the subjects are taking the test agent or are in the control group. Otherwise, he will subconsciously try to give his employer the answers the employer wants (Gwaltney 407; Haggie 1794; Knight 2051; Lamm 2934, 2937; Sadusk 3206; Carson 3589, 3601; Jawetz 3698-3701; Wehrle 3995, 4013-15, 4037-39; Lasagna 4126, 4133-34; CX 162G-I). As Dr. Knight reported to respondent (CX 162G-H):
>
> • • • In the absence of double blind controls, however, there is no way to exclude the possibility of some bias. There is a tendency of both patients and experimentalists to see a favorable effect of medication in any experiment.

As respondent's statistical expert testified (Lamm 2934):

> • • • [T]he important thing in this type of study is that your investigator be blind.

And, as one of respondent's expert medical witness testified (Sadusk 3228):

> If the doctor knew [which subject that came to him was a control and which was a test]—and this would indicate that the doctor was dishonest because he would actually ask each person—the experiment, of course, would not be valid.

The ALJ concluded that the examiner, Dr. Benjamin W. Nitzberg, was not properly "blinded" because the test protocol required that the children gargle at 9:00 a.m., and he began examining them at 10 a.m. Although Dr. Nitzberg denied that he knew which children were in the test group (Tr. 2790, 2800) or that he smelled Listerine on the student's breath except on rare occasions (*i.e.*, three or four children in six months, Tr. 2803), the ALJ concluded that Dr. Nitzberg must have detected the odor of Listerine on

the students' breath because other witnesses for respondent testified, on the basis of their own experiences with Listerine, that Listerine can be smelled on the breath for 1½ to 2 hours after gargling. IDF 99.

The record offers support for the ALJ's concern. It establishes that Dr. Nitzberg knew that the test was being conducted for Warner-Lambert, that it involved Listerine and that the data would be used to determine the effect on colds of gargling with Listerine daily, Tr. 2829. Thus, if he knew which children used Listerine, he might have biased the results in favor of Listerine. The students gargled at 9:00 a.m. (CX 51D, RX 81D); Dr. Nitzberg arrived at 10:00 a.m. (Tr. 2811, 2826) and left within an hour during the first two years of the study and within one and one-half hours during the last two years. (Tr. 2811). Therefore, many students were examined one to two hours after gargling. Two physicians who testified for respondent stated that, on the basis of their own experience with Listerine, it can be detected on the breath for 1½ to 2 hours after gargling. (Sadusk Tr. 3216, 3229-30; Krantz 1879, 1901). *See also* Carache at 3840. On the other hand, another witness for respondent testified that a laboratory instrument could not detect some ingredients of Listerine in a human subject's nasal cavity twenty minutes after the subject gargled (Tr. 2486, 2505). However, he also testified that the instrument leaked large amounts of the volatile materials (Tr. 2498), and that after the instrument failed to detect the ingredients, they were identified by smell (Tr. 2505). Considering this evidence as a whole, we are led to conclude that by virtue of respondent's own witnessees, it is uncertain whether Dr. Nitzberg was properly "blinded."

Three additional infirmities heighten our concern about the study's probative value. Students were instructed to report to the medical examiner, usually Dr. Nitzberg, at the first sign of a cold. The medical examiner would evaluate and record the overall severity of the cold plus the

severity of fourteen cold-related symptoms (only eight during the first two years of the study). The student returned to the examiner each day for the duration of the cold episode, and the physician examined and questioned the student about each symptom, recording the severity of the symptoms on the same sheet that he used the previous day (a rating scale of 0-4 was used during the first two years and 0-7 for the last two). Dr. Nitzberg allotted himself only 1½ to 2 minutes to examine and question each child (Tr. 2820). This procedure detracts from the probative value of the test in three respects. First, by using the same score sheet day after day Dr. Nitzberg would know how he evaluated a child's symptoms the previous day (Tr. 2822-23). As the ALJ found, Dr. Nitzberg's knowledge of what he had done previously would tend to bias his scores, and therefore he would not make an independent judgment each day. IDF 101. Second, given the number of symptoms which Dr. Nitzberg had to evaluate and the fine gradations he had to make in his evaluation, we question whether he spent an adequate amount of time on each subject. In addition to asking each child for historical data on every item on the report form, he would "examine the upper respiratory tract, the eyes, the ears, the nose and the throat, the sinuses by palpitation and the neck for cervical adenopathy" Tr. 2791. During the last two years of the study the examiner checked for six additional symptoms (Tr. 2798-99). On Mondays he often had to fill in the form for Saturday and Sunday. (*See also* Tr. 2816-2819). Third, even if Dr. Nitzberg had been properly blinded the scores he recorded could have been biased to the extent the scores were based upon the non-blinded child's subjective evaluation. (*See Lamm* Tr. 2937).

All of the foregoing defects have the cumulative effect of rendering the St. Barnabas study unreliable for evaluating the efficacy of Listerine. In view of this conclusion, we find it unnecessary to consider the parties' disagreement over the meaning of the results.

2. *The Reddish Cold Tests*

During the winters of 1932 to 1942 respondent conducted tests, mainly using its own employees, to determine whether Listerine has the ability to fight colds. These tests, which respondent claimed established Listerine's efficacy against colds and sore throats, have such grave deficiencies in design and execution that their results are meaningless. Of foremost concern, no placebo was used. (During some winters control groups gargled with a saline solution or tap water. These liquids cannot qualify as adequate placebos.) Moreover, employees were allowed to choose which group they preferred, thereby further biasing the results because those who thought that gargling was an effective method for fighting a cold would most likely join the test group. In addition, the ALJ found that the investigators themselves had predetermined beliefs that Listerine was good for colds. Finally, the investigators were not provided with a uniform definition of a "cold." Common colds last no longer than 10 days, yet illnesses lasting up to 69 days were counted as "colds" in the Reddish study. Even respondent's own expert, Dr. Knight, said that "present opinion would hold that satisfactory evidence for efficacy is no longer provided by these early studies." IDF 124, CX 162G-H.

Respondent does not address these infirmities in the Reddish tests. Instead, it contends that the Commission relied upon these tests in dismissing the 1944 complaint, and therefore the ALJ's finding of deficiencies in the Reddish tests is "an impermissable [sic] relitigation of matters long ago settled." RB 67. This issue is discussed in Section IV herein.

Final Order

This matter having been heard by the Commission upon respondent's appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied the appeal; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following order be, and it hereby is, entered:

PART I

It is ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of Listerine or any other nonprescription drug product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product will cure colds or sore throats;

2. Representing, directly or by implication, that any such product will prevent colds or sore throats;

3. Representing, directly or by implication, that users of any such product will have fewer colds than nonusers.

PART II

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employ-

ees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale, or distribution of Listerine or any other mouthwash product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product is a treatment for, or will lessen the severity of, colds or sore throats;

2. Representing that any such product will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds;

3. Representing that the ability of any such product to kill germs is of medical significance in the treatment of colds or sore throats or the symptoms of colds or sore throats.

PART III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.

In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.,* English, Spanish, principally employed in the advertisement.

The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

PART IV

It is further ordered, That the allegations of Paragraphs Nine and Ten of the complaint be, and they hereby are, *dismissed.*

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in its structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a written report, setting forth in detail the manner and form of its compliance with this order.

• • • • • • • • • •

In the Matter of
WARNER-LAMBERT COMPANY

Docket 8891. Order, Mar. 26, 1976

Denial of respondent's petition to reopen proceedings to receive evidence of *ex parte* communications and of FDA findings concerning Listerine, and to wthdraw final order pending consideration of such evidence.

Appearances

For the Commission: *Wallace S. Snyder* and *William S. Busker.*

For the respondent: *Mudge, Rose, Guthrie & Alexander,* New York City and *Larry Sharp, Bergson, Borkland, Margolis & Adler,* Washington, D.C.

Respondent has petitioned the Commission to reopen the proceeding for the purpose of receiving "evidence of *ex parte* communications and of FDA findings concerning Listerine, and to withdraw [the] final order pending consideration of such evidence."

First, respondent contends that the Commission staff, through written memoranda dealing with the Commission's over-the-counter drug program, has "singl[ed] out Listerine by name, [and] made improper and damaging *ex parte* arguments to the Commission" while the above-styled matter was pending. This contention is plainly without merit. The Commission has based its determinations and order in this proceeding solely upon the record compiled in Dkt. 8891. *See Encyclopedia Britannica, Inc.* (Order Denying Motion To Reopen Record And Proceedings) (March 2, 1976 [1]). We have examined the memoranda [2] attached to

[1] Reported in this Volume.

[2] The memoranda, with one exception, consist of reports to the Commission or the Chairman as to the status of the Commission's Over-the-Counter Drug program. The exception is a report to the Director of the Bureau of Consumer Protection from the Division

respondent's Petition, as well as the portions of the memoranda which were excised prior to FOIA release. The only mention of Listerine occurs in a few statements that a proceeding exists with respect to respondent, *e.g.*, "• • • the Listerine case which is now before the Commission• • •." There are no arguments, as respondent contends, of the appropriateness of corrective advertising as a remedy in the Listerine proceeding. The references to Listerine are not *ex parte* communications since they are not statements "with respect to the merits," Rules of Practice Section 4.7.

Secondly, respondent contends that the record should be reopened since an FDA advisory panel, after issuance of the Commission's opinion and order, "found that combination products containing the active ingredients of Listerine may be efficacious for the symptomatic relief of colds and coughs and that until further test data can be developed, may continue to label and to sell the products as in the past, for the conditions indicated• • •." [footnote omitted]. We also find this contention to be without merit.

In the decision in this proceeding, the Commission concluded, on the basis of the preponderance of the evidence in the record before us, that the use of Listerine, as directed, will not prevent or cure colds or sore throats or ameliorate cold symptoms. Here the report that the respondent references in its Petition is a draft report by the FDA's review panel for over-the-counter cough and cold remedies. The report has not been adopted and thus there is no "finding," as respondent contends. The draft report has been placed on the public record for comment. *See* CCH Food, Drug & Cosmetic Law Reporter Para. 41,571 [41 F.R. 38312]. Moreover, "Category III," the category in which respondent claims its product's ingredients fall, is designated by FDA for drugs requiring additional study. Accordingly,

It is ordered, That the aforesaid petition be, and it hereby is, denied.

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of National Advertising and was a wholly intra-Bureau communication.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1976

No. 76-1138

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

(FILED DECEMBER 28, 1976)

Before: Wright and McGowan, Circuit Judges.

Order

On consideration of petitioner's motion for leave to adduce additional evidence, the opposition thereto and of petitioner's reply, it is

ORDERED by the Court that petitioner's aforesaid motion to adduce additional evidence is denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1138

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

Petition for Review of an Order of
the Federal Trade Commission

Argued March 25, 1977

Decided August 2, 1977

Herbert A. Bergson, with whom *James H. Kelley, Donald L. Hardison,* and *Larry D. Sharp* were on the brief, for petitioner.

Jerold D. Cummins, Acting Assistant General Counsel, Federal Trade Commission, with whom *Gerald P. Norton,* Acting General Counsel, Federal Trade Commission, was on the brief, for respondent. *Gerald Harwood,* Assistant General Counsel, Federal Trade Commission, at the time the record was filed, also entered an appearance for respondent.

Gilbert H. Weil filed a brief on behalf of the Association of National Advertisers, Inc. as *amicus curiae* urging reversal.

William W. Royal filed a brief on behalf of the American Advertising Federation as *amicus curiae* urging reversal.

Before BAZELON, *Chief Judge,* and WRIGHT and ROBB, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* ROBB.

WRIGHT, *Circuit Judge:* The Warner-Lambert Company petitions for review of an order of the Federal Trade Commission requiring it to cease and desist from advertising that its product, Listerine Antiseptic mouthwash, prevents cures, or alleviates the common cold. The FTC order further requires Warner-Lambert to disclose in future Listerine advertisements that: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity."[1] We affirm but modify the order to delete from the required disclosure the phrase "Contrary to prior advertising."

I. BACKGROUND

The order under review represents the culmination of a proceeding begun in 1972, when the FTC issued a complaint charging petitioner with violation of Section 5 (a) (1) of the Federal Trade Commission Act[2] by misrepresenting the efficacy of Listerine against the common cold.

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[1] This requirement terminates when petitioner has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972, approximately ten million dollars.

[2] 15 U.S.C. § 45(a)(1) (1970). At the time the complaint issued, § 5(a)(1) stated that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." This was amended in 1975 to substitute "in or affecting commerce" for the phrase "in commerce." *See* 15 U.S.C. § 45(a)(1) (Supp. V 1975).

Listerine has been on the market since 1879. Its formula has never changed. Ever since its introduction it has been represented as being beneficial in certain respects for colds, cold symptoms, and sore throats. Direct advertising to the consumer, including the cold claims as well as others, began in 1921.

Following the 1972 complaint, hearings were held before an administrative law judge (ALJ). The hearings consumed over four months and produced an evidentiary record consisting of approximately 4,000 pages of documentary exhibits and the testimony of 46 witnesses. In 1974 the ALJ issued an initial decision sustaining the allegations of the complaint. Petitioner appealed this decision to the Commission. On December 9, 1975 the Commission issued its decision essentially affirming the ALJ's findings. It concluded that petitioner had made the challenged representations that Listerine will ameliorate, prevent, and cure colds and sore throats, and that these representations were false. Therefore the Commission ordered petitioner to:

> (1) cease and desist from representing that Listerine will cure colds or sore throats, prevent colds or sore throats, or that users of Listerine will have fewer colds than non-users;[3]
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> (2) cease and desist from representing that Listerine is a treatment for, or will lessen the severity of, colds or sore throats; that it will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds; or that the ability of Listerine to kill germs is of medical significance in the treatment of colds or sore throats or their symptoms;
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> (3) cease and desist from disseminating any advertisement for Listerine unless it is clearly and conspic-

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[3] Petitioner does not contest this part of the order on appeal.

uously disclosed in each such advertisement, in the exact language below, that: 'Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.'' This requirement extends only to the next ten million dollars of Listerine advertising.[4]

Petitioner seeks review of this order. The American Advertising Federation and the Association of National Advertisers have filed briefs as *amici curiae*.

II. Substantial Evidence

The first issue on appeal is whether the Commission's conclusion that Listerine is not beneficial for colds or sore throats is supported by the evidence. The Commission's findings must be sustained if they are supported by substantial evidence on the record viewed as a whole.[5] We conclude that they are.

Both the ALJ and the Commission carefully analyzed the evidence. They gave full consideration to the studies submitted by petitioner. The ultimate conclusion that Listerine is not an effective cold remedy was based on six specific findings of fact.

First, the Commission found that the ingredients of Listerine are not present in sufficient quantities to have any therapeutic effect. This was the testimony of two leading pharmacologists called by Commission counsel. The Commission was justified in concluding that the testimony of Listerine's experts was not sufficiently persuasive to counter this testimony.[6]

Second, the Commission found that in the process of gargling it is impossible for Listerine to reach the critical

[4] *See* note 1 *supra*.

[5] *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

[6] JA 881-884, 909-921, 531-552.

areas of the body in medically significant concentration. The liquid is confined to the mouth chamber. Such vapors as might reach the nasal passage would not be in therapeutic concentration. Petitioner did not offer any evidence that vapors reached the affected areas in significant concentration.[7]

Third, the Commission found that even if significant quantities of the active ingredients of Listerine were to reach the critical sites where cold viruses enter and infect the body, they could not interfere with the activities of the virus because they could not penetrate the tissue cells.[8]

Fourth, the Commission discounted the results of a clinical study conducted by petitioner on which petitioner heavily relies. Petitioner contends that in a four-year study schoolchildren who gargled with Listerine had fewer colds and cold symptoms than those who did not gargle with Listerine. The Commission found that the design and execution of the "St. Barnabas study" made its results unreliable. For the first two years of the four-year test no placebo was given to the control group. For the last two years the placebo was inadequate: the control group was given colored water which did not resemble Listerine in smell or taste. There was also evidence that the physician who examined the test subjects was not blinded[9] from

[7] JA 556-557.

[8] JA 508-510, 533.

[9] People who are given medication for an ailment frequently feel better because they think they should, even though the product has no therapeutic value. This is known as the placebo effect. In order to eliminate the bias of the placebo effect in a clinical study, it is common practice to "blind" the participants, *i.e.*, dispense to the control group a placebo which simulates in taste, smell, and appearance the product being tested. Similarly, to neutralize any subconscious bias of the examiner, it is important to blind him, *i.e.*, prevent him from knowing which subjects received the medication and which did not. A study in which both the subjects and the examiner are blinded is referred to as "double-blind." *See* JA 914-916.

knowing which children were using Listerine and which were not, that his evaluation of the cold symptoms of each child each day may have been imprecise, and that he necessarily relied on the non-blinded child's subjective reporting. Both the ALJ and the Commission analyzed the St. Barnabas study and the expert testimony about it in depth and were justified in concluding that its results are unreliable.[10]

Fifth, the Commission found that the ability of Listerine to kill germs by millions on contact is of no medical significance in the treatment of colds or sore throats. Expert testimony showed that bacteria in the oral cavity, the "germs" which Listerine purports to kill, do not cause colds and play no role in cold symptoms. Colds are caused by viruses. Further, "while Listerine kills millions of bacteria in the mouth, it also leaves millions. It is impossible to sterilize any area of the mouth, let alone the entire mouth." [11]

Sixth, the Commission found that Listerine has no significant beneficial effect on the symptoms of sore throat. The Commission recognized that gargling with Listerine could provide temporary relief from a sore throat by removing accumulated debris irritating the throat.[12] But this type of relief can also be obtained by gargling with salt water or even warm water.[13] The Commission found that this is not the significant relief promised by petitioner's advertisements. It was reasonable to conclude that "such

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[10] JA 515-528, 913-920.

[11] JA 879-881.

[12] JA 876, 506.

[13] Petitioner argued that the lower the surface tension of a gargle the greater its ability to remove the irritating debris, and there was evidence that Listerine has a lower surface tension than salt water. However, there was no evidence that this lower surface tension translates into meaningfully greater relief. JA 876.

temporary relief does not 'lessen the severity' of a sore throat any more than expectorating or blowing one's nose 'lessens the severity' of a cold." [14]

In its attack on the Commission's findings, petitioner relies heavily on a recent study of over-the-counter cold remedies by the Food and Drug Administration [15] which petitioner alleges found Listerine "likely to be effective." [16] Its argument is two-pronged: first, that the fact that the Commission's findings differ from the FDA's proves that the Commission's findings are wrong; and second, that it was error for the Commission to refuse to reopen its proceedings when the FDA study was released. We conclude that both of these arguments are without merit for the simple reason that the FDA study does not, to any significant degree, contradict the Commission's findings.

The FDA study is the product of an expert panel appointed in 1972 to study all over-the-counter cold, cough, allergy, bronchodilator, and anti-asthmatic drug products —some 180 ingredients used in as many as 50,000 products.[17] The panel's draft report was issued in February 1976, two months after the FTC issued its order against Listerine. The FTC refused to reopen its proceedings to consider the draft report. In September 1976 the expert panel's report was published, but it has not yet been adopted by the Commissioner of the FDA.[18]

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[14] Respondent's br. at 32 n.27.

[15] Petitioner's motion requesting that the court take judicial notice of the FDA study is hereby granted.

[16] *See* note 23 *infra*.

[17] JA 3121-3129, 3280.

[18] 41 FED. REG. 38312 (Sept. 9, 1976). The Commissioner stated: "The Commissioner has not yet fully evaluated the report, but has concluded that it should first be issued as a formal proposal to obtain full public comment before any decision is made on the recommendations of the Panel." *Id.*

The only evidence pertinent to the effectiveness of Listerine that the FDA panel considered was the St. Barnabas study, and it appears that reference to it was included in the report only as an afterthought.[19] More importantly, the reference which does appear does not endorse or adopt the St. Barnabas study; the FDA report merely describes it and recounts the results.[20] The panel's own conclusions are reflected in the operative language repeated for each ingredient of Listerine:

> There are no well-controlled studies documenting the effectiveness of [eucalyptol/eucalyptus oil, menthol, thymol] as an [antitussive, expectorant, nasal decongestant].
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> • • • •

[19] The draft report published in February 1976 did not refer to mouthwashes or the St. Barnabas study. After it was issued the panel received a letter, apparently from petitioner, "concerning the fact that no references were made in the report on a submission concerning the use of volatile aromatics in mouthwashes for any symptomatic relief of the common cold." Minutes of the panel's meeting of March 2 and 3, 1976, JA 3045. The panel then voted to add to the sections of the report dealing with menthol, eucalyptol, and thymol (three of Listerine's active ingredients) a paragraph describing the St. Barnabas study. JA 3046.

[20] The effect of rinsing and gargling twice daily with an aqueous mixture of volatile substances on the incidence of colds and the severity of the symptoms associated with colds was evaluated in a long-term double-blind, placebo-controlled, subjective study in school children. The results of the study revealed milder nasal symptoms and cough symptoms in individuals using the medicated mouthwash as compared to the placebo. Although the medicated mouthwash contained [eucalyptol, menthol, thymol], the results did not demonstrate the contribution of this component to the overall alleviation of symptoms • • •.

41 FED. REG. 38348 (1976); *see also id.* at 38351 38353, 38409, 38411, 38413. To the extent that the report describes the St. Barnabas study as "double-blind, placebo-controlled," it appears to be in error. *See* text at notes 8-10 *supra*.

> For use as a mouthwash: Data to demonstrate effectiveness will be required • • •.[21]

Each ingredient of Listerine was placed in Category III, defined as "the available data are insufficient to classify such condition under either [Category I, generally recognized as safe and effective] or [Category II, not generally recognized as safe and effective] and for which further testing is therefore required." [22] Petitioner's assertion that this is equivalent to finding the product "likely to be effective" is not supported by the facts.[23]

In sum, the FDA study does not reflect any new data not considered by the FTC. Since the FDA did not consider the extensive record compiled in the FTC proceedings, its conclusion that there is insufficient data about the ingre-

[21] 41 FED. REG. 38347-38349 (1976); *see also id.* at 38350-38351, 38353, 38361, 38364-38365, 38408-38411, 38413 (1976).

[22] 21 C.F.R. § 330.10(a)(5)(iii) (1976).

[23] The only place in the FDA report where the phrase "likely to be effective" appears is in the introduction to the report, where the panel outlines its duties. In an apparent reference to Category III, the panel lists as one task:

> Advising the Food and Drug Administration regarding those ingredients which in their judgment are likely to be safe and effective, but for which more data are needed.

41 FED. REG. at 38319. Petitioner concludes from this that every ingredient which the panel placed in Category III—including those in Listerine—was found "likely to be effective." This extrapolation is unwarranted. Every other reference to Category III in the report says simply "the available data are insufficient." *See, e.g., id.* at 38312, 38329, 38343, 38359, 38405. Similarly, the notation that data are insufficient is made for each ingredient of Listerine, *see* note 21 *supra*, while the phrase "likely to be effective" is never used in connection with any of them. We conclude that the panel put in Category III ingredients which were not proven effective or ineffective, in accordance with the mandate of 21 C.F.R. § 330.10(a)(5)(iii), and that the phrase "likely to be effective" in the introduction was an aberration.

dients of Listerine to justify classifying it as effective or ineffective is not necessarily inconsistent with the FTC's conclusion that Listerine's advertising claims are deceptive. The FTC did not err in refusing to reopen its proceedings to consider the draft FDA study, and the FDA findings do not establish that the FTC's conclusions are wrong.

III. The Commission's Power

Petitioner contends that even if its advertising claims in the past were false, the portion of the Commission's order requiring "corrective advertising" exceeds the Commission's statutory power. The argument is based upon a literal reading of Section 5 of the Federal Trade Commission Act, which authorizes the Commission to issue "cease and desist" orders against violators and does not expressly mention any other remedies.[24] The Commission's position, on the other hand, is that the affirmative disclosure that Listerine will not prevent colds or lessen their severity is absolutely necessary to give effect to the prospective cease and desist order; a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims.

The need for the corrective advertising remedy and its appropriateness in this case are important issues which we will explore *infra*. But the threshold question is whether the Commission has the authority to issue such an order.[25] We hold that it does.

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[24] Section 5(b) provides in pertinent part:

> If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it shall • • • issue • • • an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

15 U.S.C. § 45(b) (1970).

[25] For reasons set forth below, we have decided to modify the Commission's order by deleting the phrase "Contrary to prior advertising." All of our discussion of the Commission's power refers to the order as modified.

Petitioner's narrow reading of Section 5 was at one time shared by the Supreme Court. In *FTC v. Eastman Kodak Co.* the Court held that the Commission's authority did not exceed that expressly conferred by statute. The Commission has not, the Court said, "been delegated the authority of a court of equity."[26]

But the modern view is very different. In 1963 the Court ruled that the Civil Aeronautics Board has authority to order divestiture in addition to ordering cessation of unfair methods of competition by air carriers.[27] The CAB statute, like Section 5, spoke only of the authority to issue cease and desist orders, but the Court said, "We do not read the Act so restrictively. • • • [W]here the problem lies within the purview of the Board, • • • Congress must have intended to give it authority that was ample to deal with the evil at hand." The Court continued, "Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees • • •. [The] power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority • • •."[28]

Later, in *FTC v. Dean Foods Co.*, the Court applied *Pan American* to the Federal Trade Commission.[29] In upholding the Commission's power to seek a preliminary

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[26] 274 U.S. 619, 623 (1927) (setting aside order requiring Kodak to divest itself of three laboratories as part of unfair competition remedy).

[27] *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

[28] *Id.* at 311-312 & 312 n.17.

[29] 384 U.S. 597 (1966). The Court also noted that *Eastman Kodak* had been "repudiated" in *Pan American*. *Id.* at 606 n.4.

injunction against a proposed merger, the Court held that it was not necessary to find express statutory authority for the power. Rather, the Court concluded, "It would stultify congressional purpose to say that the Commission did not have the • • • power • • •. • • • Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities." [30]

Thus it is clear that the Commission has the power to shape remedies which go beyond the simple cease and desist order. Our next inquiry must be whether a corrective advertising order is for any reason outside the range of permissible remedies. Petitioner and *amici curiae* argue that it is because (1) legislative history precludes it, (2) it impinges on the First Amendment, and (3) it has never been approved by any court.

A. *Legislative History*

Petitioner relies on the legislative history of the 1914 Federal Trade Commission Act [31] and the Wheeler-Lea amendments to it in 1938 [32] for the proposition that corrective advertising was not contemplated. In 1914 and in 1938 Congress chose not to authorize such remedies as criminal penalties, treble damages, or civil penalties, but that fact does not dispose of the question of corrective advertising.[33]

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[30] 384 U.S. at 606-607.

[31] 38 STAT. 717 (1914).

[32] 52 STAT. 111 (1938).

[33] It is true that one Court of Appeals has relied on this history in concluding that the Commission does not have power to order restitution of ill-gotten monies to the injured consumers. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). But restitution is not corrective advertising. Ordering refunds to *past* consumers is very different from ordering affirmative disclosure to correct misconceptions which *future* consumers may hold. Moreover, the *Heater* court itself recognized this distinction and expressly distinguished

Petitioner's reliance on the legislative history of the 1975 amendments to the Act[34] is also misplaced. The amendments added a new Section 19 to the Act authorizing the Commission to bring suits in federal District Courts to redress injury to consumers resulting from a deceptive practice. The section authorizes the court to grant such relief as it "finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice," including, but not limited to,

> rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice • • •.[35]

Petitioner and *amici* contend that this congressional grant *to a court* of power to order public notification of a violation establishes that the Commission by itself does not have that power.

We note first that "public notification" is not synonymous with corrective advertising; public notification is a much broader term and may take any one of many forms.[36] Second, the "public notification" contemplated by the amendment is directed at *past* consumers of the product ("to redress injury"), whereas the type of corrective ad-

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corrective advertising, which it said the Commission is authorized to order, from restitution. 503 F.2d at 323 n.7 and 325 n.13.

[34] The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 STAT. 2183 (1975).

[35] 15 U.S.C. § 57b(b) (Supp. V 1975).

[36] For example, it might encompass requiring the defendant to run special advertisements reporting the FTC finding, advertisements advising consumers of the availability of a refund, or the posting of notices in the defendant's place of business.

vertising currently before us is directed at *future* consumers. Third, petitioner's construction of the section runs directly contrary to the congressional intent as expressed in a later subsection: "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."[37] Moreover, this intent is amplified by the conference committee's report:

> The section * * * is not intended to modify or limit any existing power the Commission may have to itself issue orders designed to remedying [*sic*] violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way.[38]

We conclude that this legislative history cannot be said to remove corrective advertising from the class of permissible remedies.[39]

B. *The First Amendment*

Petitioner and *amici* further contend that corrective advertising is not a permissible remedy because it trenches

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[37] 15 U.S.C. § 57b(e) (Supp. V 1975).

[38] Conference Report No. 93-1408, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News at 7774.

[39] The dissent infers from the 1975 amendments a congressional judgment that the Commission did not already have the power to order corrective advertising. That inference is not justified. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 610 (1966) (Court will not construe an agency's request for authorizing legislation as affirmative proof of no authority; "[p]ublic policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations"); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 696 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (subsequent grant of congressional authority does not prove agency's prior lack of authority; "it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation").

on the First Amendment. Petitioner is correct that this triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved.[40] But this goes to the appropriateness of the order in this case, an issue we reach in Part IV of this opinion. *Amici curiae* go further, arguing that, since the Supreme Court has recently extended First Amendment protection to commercial advertising,[41] mandatory corrective advertising is unconstitutional.

A careful reading of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[42] compels rejection of this argument. For the Supreme Court expressly noted that the First Amendment presents "no obstacle" to government regulation of false or misleading advertising. The First Amendment, the Court said,

> as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.[43]

In a footnote the Court went on to delineate several differences between commercial speech and other forms which may suggest "that a different degree of protection is necessary * * *." For example, the Court said, they may

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[40] *United States v. Nat'l Society of Professional Engineers*, —— F.2d ——, —— (D.C. Cir. No. 76-1023, decided March 14, 1977) (slip op. at 12-13); *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-620 (3d Cir. 1976), *cert. denied*, —— U.S. ——, 45 U.S. L. WEEK 3707 (April 26, 1977).

[41] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[42] 425 U.S. 748 (1976).

[43] *Id.* at 772. *See also Bates v. State Bar of Arizona*, —— U.S. ——, ——, 45 U.S. L. WEEK 4895, 4904 (June 28, 1977).

> make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.[44]

The Supreme Court clearly foresaw the very question before us, and its statement is dispositive of *amici's* contention.[45]

C. *Precedents*

According to petitioner, "The first reference to corrective advertising in Commission decisions occurred in 1970, nearly fifty years and untold numbers of false advertising cases after passage of the Act."[46] In petitioner's view, the late emergence of this "newly discovered"[47] remedy is itself evidence that it is beyond the Commission's authority. This argument fails on two counts. First the fact that an agency has not asserted a power over a period of years is not proof that the agency lacks such power.[48] Second, and more importantly, we are not convinced that the corrective advertising remedy is really such an innovation. The label may be newly coined, but the concept is well established. It is simply that under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts.

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[44] 425 U.S. at 771-772 n.24.

[45] Equally without merit are *amici's* arguments that the order constitutes an unconstitutional taking of property without just compensation and that rulemaking, not adjudication, was the proper vehicle for issuance of such an order.

[46] Petitioner's br. at 27.

[47] *Id.* at 29.

[48] *United States v. Morton Salt Co.*, 338 U.S. 632, 647-648 (1950); *National Petroleum Refiners Ass'n v. FTC*, *supra* note 39, 482 F.2d at 693-694.

One such circumstance is when an advertisement that did not contain the disclosure would be misleading. For example, the Commission has ordered the sellers of treatments for baldness to disclose that the vast majority of cases of thinning hair and baldness are attributable to heredity, age, and endocrine balance (so-called "male pattern baldness") and that their treatment would have no effect whatever on this type of baldness.[49] It has ordered the promoters of a device for stopping bedwetting to disclose that the device would not be of value in cases caused by organic defects or diseases.[50] And it has ordered the makers of Geritol, an iron supplement, to disclose that Geritol will relieve symptoms of tiredness only in persons who suffer from iron deficiency anemia, and that the vast majority of people who experience such symptoms do not have such a deficiency.[51]

Each of these orders was approved on appeal over objections that it exceeded the Commission's statutory authority.[52] The decisions reflect a recognition that, as the Supreme Court has stated,

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[49] *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960).

[50] *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960).

[51] *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967). *Compare Alberty v. FTC*, 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950), discussed in note 52 *infra*.

[52] In *Alberty v. FTC*, *supra* note 51, this court set aside an order similar to the one upheld in *J. B. Williams Co. v. FTC*, *supra* note 51. The precise holding of *Alberty* is disputed. Several courts have stated that it held only that the Commission must make an express finding that failure to make disclosure is misleading before it can require such disclosure. *Feil v. FTC*, *supra* note 50; *Ward Laboratories, Inc. v. FTC*, *supra* note 49; *Keele Hair & Scalp Specialists, Inc. v. FTC*, *supra* note 49. To the extent that *Alberty* may have held that the Commission lacked power to order corrective advertising, it has never been followed. The characterization

> If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.[53]

Affirmative disclosure has also been required when an advertisement, although not misleading if taken alone, becomes misleading considered in light of past advertisements. For example, for 60 years Royal Baking Powder Company had stressed in its advertising that its product was superior because it was made with cream of tartar, not phosphate. But, faced with rising costs of cream of tartar, the time came when it changed its ingredients and became a phosphate baking powder. It carefully removed from all labels and advertisements any reference to cream of tartar and corrected the list of ingredients. But the new labels used the familiar arrangement of lettering, coloration, and design, so that they looked exactly like the old ones. A new advertising campaign stressed the new low cost of the product and dropped all reference to cream of tartar. But the advertisements were also silent on the subject of phosphate and did not disclose the change in the product.

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of the required disclosure as "additional interesting, and perhaps useful, information" may or may not have been accurate in *Alberty*, but it grossly understates the case at hand. The disclosure that Listerine does not relieve colds is essential information to correct a widely held, mistaken belief which was cultivated by petitioner's past advertising.

FTC v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976), is readily distinguishable on this ground. There an order requiring affirmative disclosure was set aside because there was no evidence that consumers seeing the advertisements formed an incorrect belief or were misled. In short, there was nothing to correct. That is not this case.

[53] *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (footnote omitted).

The Commission held, and the Second Circuit agreed, that the new advertisements were deceptive, since they did not advise consumers that their reasons for buying the powder in the past no longer applied. The court held that it was proper to require the company to take affirmative steps to advise the public.[54] To continue to sell the new powder

> on the strength of the reputation attained through 60 years of its manufacture and sale and wide advertising of its superior powder, under an impression induced by its advertisements that the product purchased was the same in kind and as superior as that which had been so long manufactured by it, was unfair alike to the public and to the competitors in the baking powder business.[55]

In another case[56] the Waltham Watch Company of Massachusetts had become renowned for the manufacture of fine clocks since 1849. Soon after it stopped manufacturing clocks in the 1950's, it transferred its trademarks, good will, and the trade name "Waltham" to a successor corporation, which began importing clocks from Europe for resale in the United States. The imported clocks were advertised as "product of Waltham Watch Company since 1850," "a famous 150-year-old company."

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[54] The order required Royal to cease using any label which simulated the old familiar label, to incorporate the word "phosphate" as part of the name of the product on all labels and in all advertisements, to cease from representing that the old product had been reduced in price, and to cease from representing that the new product was the baking powder sold by Royal for many years.

[55] *Royal Baking Powder Co. v. FTC*, 281 F. 744, 753 (2d Cir. 1922).

[56] *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963). *See also Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427 (7th Cir.), *cert. denied*, 377 U.S. 992 (1964).

The Commission found that the advertisements caused consumers to believe they were buying the same fine Massachusetts clocks of which they had heard for many years. To correct this impression the Commission ordered the company to disclose in all advertisements and on the product that the clock was not made by the old Waltham company and that it was imported. The Seventh Circuit affirmed, relying on "the well-established general principle that the Commission may require affirmative disclosure for the purpose of preventing future deception."[57]

It appears to us that the orders in *Royal* and *Waltham* were the same kind of remedy the Commission has ordered here. Like Royal and Waltham, Listerine has built up over a period of many years a widespread reputation. When it was ascertained that that reputation no longer

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[57] 318 F.2d at 32. *Accord, Ward Laboratories, Inc. v. FTC, supra* note 49. The dissent incorrectly states that the Royal and Waltham ads and labels were false on their face (just as selling moonshine in Haig & Haig bottles would be) and that the courts simply ordered the misrepresentations removed. To the contrary, the Royal and Waltham ads and labels were strictly truthful, but they *became* misleading when considered in light of past advertisements. *See* 281 F. at 748-749 and 318 F.2d at 30-31.

[58] In *Royal* and *Waltham* the advertising claims that had given rise to the products' reputations were concededly true when made, but because the products themselves had changed that reputation was no longer deserved. Consumers would have been deceived, in the future, if they had continued to make purchases in reliance upon this reputation. Here, of course, the Commission has determined that Listerine's cold claims were *never* true, and that its reputation as a cold remedy was thus never deserved. What has changed in this case is not the product itself, but the extent of our knowledge of the evidence underlying the advertising claims. But the result here is the same as in the earlier cases—like Royal baking powder or Waltham watches, Listerine continues to enjoy a reputation it does not deserve, and consumers would therefore be deceived if they were to make purchases in reliance upon that reputation.

applied to the product, it was necessary to take action to correct it.[58] Here, as in *Royal* and *Waltham*, it is the accumulated impact of *past* advertising that necessitates disclosure in *future* advertising.[59] To allow consumers to continue to buy the product on the strength of the impression built up by prior advertising—an impression which is now known to be false—would be unfair and deceptive.[60]

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[59] We thus find unpersuasive petitioner's contention that the corrective advertising ordered here is unprecedented in that it seeks "to eliminate perceived future effects of past violations that are wholly unrelated to future conduct • • •." Petitioner's br. at 26. We all agree with the Commission that the "common thread" linking earlier corrective advertising cases extends to the present case as well. *See* JA 894.

The distinctions petitioner seeks to draw between the present case and earlier corrective advertising cases are essentially semantic. It argues that, unlike *Royal*, *Waltham*, and similar cases, here the Commission made no specific finding that even truthful future Listerine ads would themselves be deceptive without a corrective statement. Petitioner's br. at 38. Similarly, while petitioner appears to concede that continued *sales* of a product under false pretenses may constitute violation of the FTC Act justifying imposition of corrective advertising, it argues that the Commission offered no evidence to support a finding of such a violation here. Petitioner's br. at 26. It seems clear to us that these various different "theories" are in fact simply different ways of describing the same thing. The nature of the violation, and the nature of the remedy required, are no different whether one says that future truthful *ads* will be "deceptive" when viewed against the backdrop of earlier advertising, or that future *sales* to customers who have been misled by earlier advertising will constitute the deceptive practice, or, as the Commission said here, that "there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief [that arose from prior deceptive advertisements]." JA 894. The Commission's authority to impose corrective advertising obviously should not turn upon the particular verbal formula chosen in a particular case.

[60] There is also precedent in other contexts for Commission action to dissipate future effects of a company's past wrongful conduct. In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966),

IV. The Remedy

Having established that the Commission does have the power to order corrective advertising in appropriate cases, it remains to consider whether use of the remedy against Listerine is warranted and equitable. We have concluded

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after remand, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969), the court approved an order requiring the petitioner to grant patent licenses where he had obtained the patent by illegal conduct. The court said his retention of the fruits of his unlawful conduct would itself be an unfair practice and the Commission had the power to prevent it.

In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Supreme Court affirmed a judgment that a newspaper publisher, in an effort to destroy a competing radio station, had unlawfully refused to accept advertising from anyone who advertised on the radio station. The Court approved a District Court order requiring the newspaper to publish each week for 25 weeks a conspicuous notice apprising the public of the terms of the judgment. The order was necessary to prevent the newspaper from continuing to reap the benefits of its wrongful conduct.

While we do not know and do not decide whether our petitioner made its false cold claims in good faith or bad, we do observe that for an advertiser who knowingly advertises falsely a simple cease and desist order provides no real deterrent. He has nothing to lose but attorneys' fees. He gets to use the deceptive advertisements until he is caught—more precisely, until Commission proceedings, which usually drag on for years, are completed against him. By the time the order has become final, the particular campaign has probably been squeezed dry, if not already discarded. In the meantime the seller has increased his market share and reaped handsome profits. The order to cease making the false claims takes none of this away from him. In short, "[a] cease and desist order which commands the respondent only to 'go, and sin no more' simply allows every violator a free bite at the apple." Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 Harv. L. Rev. 477, 482-483 (1971). *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 693-694 (1977); Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Build Strong Bodies Twelve Ways*, 70 Mich. L. Rev. 374 (1971).

that part 3 of the order should be modified to delete the phrase "Contrary to prior advertising."[81] With that modification, we approve the order.

Our role in reviewing the remedy is limited. The Supreme Court has set forth the standard:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.[82]

The Commission has adopted the following standard for the imposition of corrective advertising:

> [I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to termi-

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[81] The Federal Trade Commission Act gives the reviewing court the power to "enter a decree affirming, modifying, or setting aside the order of the Commission * * *." 15 U.S.C. § 45(c) (1970).

[82] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-613 (1946). *See also FTC v. Ruberoid Co., supra* note 53; *Carter Products, Inc. v. FTC*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

nate the otherwise continuing ill effects of the advertisement.[63]

We think this standard is entirely reasonable. It dictates two factual inquiries: (1) did Listerine's advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases? It strikes us that if the answer to both questions is not yes, companies everywhere may be wasting their massive advertising budgets. Indeed, it is more than a little peculiar to hear petitioner assert that its commercials really have no effect on consumer belief.

For these reasons it might be appropriate in some cases to presume the existence of the two factual predicates for corrective advertising.[64] But we need not decide that question, or rely on presumptions here, because the Commission adduced survey evidence to support both propositions. We find that the "Product Q" survey data and the expert testimony interpreting them[65] constitute substantial evidence in support of the need for corrective advertising in this case.

We turn next to the specific disclosure required: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." Petitioner is ordered to include this statement in every future adver-

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[63] JA 894.

[64] *See* Pitofsky, *supra* note 60, 90 HARV. L. REV. at 696-700.

[65] The Commission used the results of a series of market surveys known as "Product Q" reports on the "Mouthwash Market." The surveys were conducted by petitioner for its own purposes from 1963 to 1971. According to petitioner's own advertising agency, "Product Q is ideally suited to provide guidance in such vital areas as • • • [h]ow successful are the current advertising campaigns of different brands on awareness, recall, attitudes and sales?" JA 2785-2786. The surveys showed that about 70% of the consumers questioned recalled "effective for colds and sore throats" as a main theme of Listerine advertising. During the summer, when no cold claims had been broadcast for about six months, the percentage fell to only 64%; *i.e.*, the recall of cold claims after six months of silence was very substantial. The surveys also showed that about 60% of consumers questioned believed Listerine was "one of the best" mouthwashes for the quality "effective against colds and sore throats." JA 568-580.

The Commission also relied on the testimony of two experts in the field of consumer marketing surveys. Dr. Bass testified that cold efficacy belief levels would continue at about 60% for two years after colds advertising ceased and would remain high after five years. JA 1591-1592, 1617. Dr. Rossi testified that cold efficacy beliefs would decline at no greater a rate than 5% per year. JA 1522, 1556-1559.

[66] *See* note 1 *supra*.

[67] JA 865.

[68] *Cf. United States v. Nat'l Society of Professional Engineers*, *supra* note 40, —— F.2d at ——, slip op. at 12-13 (order should not be more intrusive than necessary to achieve fulfillment of the governmental interest); *Beneficial Corp. v. FTC*, *supra* note 40, 542 F.2d at 618-620 (same).

tisement for Listerine for a defined period.[66] In printed advertisements it must be displayed in type size at least as large as that in which the principal portion of the text of the advertisement appears and it must be separated from the text so that it can be readily noticed. In television commercials the disclosure must be presented simultaneously in both audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, may occur.[67]

These specifications are well calculated to assure that the disclosure will reach the public. It will necessarily attract the notice of readers, viewers, and listeners, and be plainly conveyed. Given these safeguards, we believe the preamble "Contrary to prior advertising" is not necessary. It can serve only two purposes: either to attract attention that a correction follows or to humiliate the advertiser. The Commission claims only the first purpose for it, and this we think is obviated by the other terms of the order.[68]

The second purpose, if it were intended, might be called for in an egregious case of deliberate deception,[69] but this is not one. While we do not decide whether petitioner proferred its cold claims in good faith or bad, the record compiled could support a finding of good faith.[70] On these facts, the confessional preamble to the disclosure is not warranted.

Finally, petitioner challenges the duration of the disclosure requirement. By its terms it continues until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period April 1962 to March 1972. That is approximately ten million dollars.[71] Thus if petitioner continues to advertise normally the corrective advertising will be required for about one year. We cannot say that is an un-

[69] We express no view on the question whether an order intended to humiliate the wrongdoer would be so punitive as to be outside the Commission's proper authority.

[70] Petitioner strenuously urges its good faith and offers in support thereof its reliance on the St. Barnabas study which allegedly supported Listerine's claims, *see* text at notes 8-10 *supra*, and on previous "acquittals" by the Commission. The Commission reviewed Listerine's cold claims in 1932, 1940, 1951, 1958, and 1962, and took no action against them. JA 2738-2740.

While good faith may be relevant to the fairness of a confessional preamble, it is irrelevant to the need for corrective advertising in general. Innocence of motive is not a defense if an advertisement is prejudicial to the public interest. As the Supreme Court stated in *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934):

> Indeed there is a kind of fraud • • • in clinging to a benefit which is the product of misrepresentation, however innocently made. • • • That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

(Citations omitted.)

[71] Petitioner's br. at 56.

reasonably long time in which to correct a hundred years of cold claims. But, to petitioner's distress, the requirement will not expire by mere passage of time. If petitioner cuts back its Listerine advertising, or ceases it altogether, it can only postpone the duty to disclose.[72] The Commission concluded that correction was required and that a duration of a fixed period of time might not accomplish that task, since petitioner could evade the order by choosing not to advertise at all. The formula settled upon by the Commission is reasonably related to the violation it found.

Accordingly, the order, as modified, is

Affirmed.

[72] The ALJ had set the duration of the requirement at two years, but conceded that "[o]ne variable that will have an effect upon what is accomplished is the amount of Listerine advertising respondent may see fit to engage in." JA 585. The Commission's formula takes that variable into account.

ROAN, *Circuit Judge, dissenting in part*: I agree with the majority that there is substantial evidence in the record to support an order requiring Warner-Lambert to cease and desist from advertising Listerine as a remedy for colds and sore throats. I therefore agree that Parts I, II, IV and V of the Commission's order must be affirmed.

I dissent from the affirmance of Section III of the order which (1) forbids Warner-Lambert to disseminate any advertisement for Listerine unless accompanied by a corrective statement relating to past advertising, and (2) provides that this "duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972."—a sum of approximately ten million dollars.[1] In

[1] Section III of the FTC Order contains the corrective advertising requirement. It states in full:

> IT IS FURTHER ORDERED that respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:
>
> > Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.
>
> In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.*, English, Spanish, principally employed in the advertisement.

my judgment this requirement of corrective advertising is beyond the statutory authority of the Federal Trade Commission. The Commission's authority to enter cease and desist orders is prospective in nature; the purpose of cease and desist orders is "to prevent illegal practices in the future", *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), not "to punish or to fasten liability on respondents for past conduct". *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948). The cases that have construed the Commission's remedial power, *e.g.*, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 392-93 (1959); *FTC v. Ruberoid Co., supra; FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 610-12 (1946), stand only for the proposition that the Commission has broad discretion in determining what conduct of a respondent shall be forbidden prospectively. I think this authority does not encompass the power to employ the retrospective remedy of corrective advertising; and I find no other basis for that asserted power.

As the majority recognizes, Congress by amendment of the Federal Trade Commission Act in 1975 authorized the Commission to commence civil actions in federal district courts, to remedy unfair or deceptive acts or practices "with respect to which the Commission has issued a final cease and desist order". As part of the relief granted in such an action the court was given the power to order "public notification respecting the . . . unfair or deceptive acts or practices". So far as pertinent the amendment reads as follows:

> The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

86 F.T.C. 1398, 1485-86 (1975).

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning or section 45(a) of this title) *with respect to which the Commission has issued a final cease and desist order* which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. *If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.*

(b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, recission or reformation of contracts, the refund of money or return of property, the payment of damages, and *public notification* respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. § 57b(b)(2) and 57b(b). [Emphasis supplied]

The majority comments briefly that the 1975 Amendment "cannot be said to remove corrective advertising from the class of permissible remedies"; the expressed "congressional intent", says the majority, is to the contrary. I think the 1975 legislation cannot be so lightly dismissed. The amendment indicates to me that at least in the judgment

of the Congress the Commission does not have, and is not intended to have, the power to order "public notification" by way of corrective advertising. If the Commission already had that power, why was the amendment necessary? Moreover, the majority fails to note that under the amendment a district court can order public notification only on a showing that the respondent acted in bad faith. Yet the theory of the Commission, accepted by the majority, is that the Commission may enter a corrective advertising order even though a false advertisement was published in good faith. To me it is strange that the Congress would require a court to find bad faith, while authorizing the Commission to act in the absence of bad faith.

The majority attempts to distinguish "public notification" from corrective advertising. First, says the majority, "public notification is a much broader term" than corrective advertising. It is clear to me however that the term public notification includes corrective advertising of the type ordered in this case. Indeed, the examples of public notification given by the majority (n.36) are simply variations of corrective advertisements.[2] Second, the majority says "the 'public notification' contemplated by the amendment is directed at *past* consumers of the product . . .

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[2] As one example of "public notification" the majority says in n.36 "it might encompass requiring the defendant to run special advertisements reporting the FTC finding . . . ." I note however that according to the FTC such advertisements are "corrective advertising". In its opinion in the case before us, 86 F.T.C. 1398, 1498 (1975) the Commission states that it "has accepted numerous consent orders which require corrective advertising." In support of this statement the Commission cites several cases as examples of cases in which corrective advertising was ordered. (*Id.*, pp. 1498-99, n.22) In at least three of those cases the Commission required the respondent to publish advertisements advising the public of the FTC finding and retracting prior deceptive statements. Pay Less Drug Stores Northwest, Inc., 82 F.T.C. 1473 (1973); Boise Tire Co., 83 F.T.C. 21 (1973); Wasem's, Inc. 84 F.T.C. 209 (1974).

whereas the type of corrective advertising currently before us is directed at *future* consumers." [Emphasis in original] I think the term "public notification" must not be construed so narrowly that future consumers are ignored.

My view of the significance of the amendment is buttressed by the statement of Senator Moss, a co-sponsor of the bill, 120 Cong. Rec. 40712 (1974): "The Federal Trade Commission's improvements specified in the bill will afford, in my opinion, long-term improvement in the fairness of the American marketplace. No longer will the Federal Trade Commission be confined to slapping the wrists of persons who engage in unfair or deceptive practices and telling them not to do it again."

The majority relies upon the statement in the Conference Committee's report and the provision in the amendment to the effect that it does not affect any "existing power" of the Commission. S. Rep. No. 93-1408, 93d Cong., 2d Sess. 1974, reprinted in [1974] U.S. Code Cong. & Ad. News 7774: 15 U.S.C. § 57b(e). The majority seems to think these statements indicate a congressional intent to give the Commission authority to order corrective advertising. I am unable to understand this reasoning. The question before us is what is the "existing power" of the Commission, and that question is not answered by either the amendment or the Committee's report.

I find nothing in the cases that justifies the Commission's corrective advertising order. In particular, I am not persuaded by the majority's quotations fron the opinions of the Supreme Court in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), and *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). Taken in the context of the facts of those cases the quoted language does not support the majority's conclusion.

In the *Pan American* case the Court considered the power of the Civil Aeronautics Board under section 411 of the Civil Aeronautics Act of 1958, 49 U.S.C. § 1381, to order

an air carrier to cease and desist from "unfair . . . practices or unfair methods of competition". The Court held that the Board's jurisdiction over unfair practices and unfair methods of competition, together with its power under the Act to regulate air carriers, and to deal with consolidations, mergers, interlocking relations, pooling arrangements, etc., 49 U.S.C. §§ 1378, 1379, and its authority to enforce the Clayton Act as it is applicable to air carriers, 15 U.S.C. § 21, empower the Board to order divestiture when a combination between carriers violates the antitrust laws and hinders the Board's restructuring of routes. Considered in the light of the specific and extensive statutory underpinning upon which the Court based this decision it is a far cry from a holding that the power to order divestiture was derived only from the authority to issue cease and desist orders, as the majority opinion suggests.[3] Certainly it does not follow from this case that the power of the Federal Trade Commission to order corrective advertising can be derived from its authority to issue cease and desist orders, standing alone.

For similar reasons the language quoted by the majority from the *Dean Foods* case is not persuasive. As stated by the Supreme Court the issue in that case was:

> . . . the power of the Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a) (1964 ed.), to temporarily enjoin the consummation of a merger that is under attack before the Federal Trade Commission as violative of § 7 of the Clayton Act, as amended, 64 Stat. 1125, 15 U.S.C. § 18 (1964 ed.).

Id. at 599. The Court noted that the Clayton Act granted the Commission the power to determine the legality of a

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[3] Compulsory licensing of an illegally obtained patent, referred to in the majority's n.60, is an aspect of divestiture. A legally obtained patent permits a valid monopoly for the period of the patent; an illegally obtained patent shelters an invalid monopoly which can be "broken up" by requiring the patent holder to license its patent to competitors.

merger and to order divestiture if it proved to be appropriate, 15 U.S.C. § 21(b); and the Court therefore held that the Commission might apply to a court of appeals for a preliminary injunction to maintain the status quo until the Commission decided the matter and the court of appeals reviewed the Commission's decision. The power to pray for an injunction was described by the Supreme Court as "incidental" to the Commission's authority under the Clayton Act. *Id.* at 606. To deny this plainly incidental power to preserve the Commission's and the court's jurisdiction, said the Supreme Court, "would stultify congressional purpose." Here again I think this decision does not support the majority's leap to the conclusion that the power to issue a cease and desist order, without more, authorizes the Commission to enter a corrective advertising order, nor does the decision justify a conclusion that the corrective order can be sustained under some general remedial power of the Commission.

The other cases cited by the majority do not justify the Commission's order. In those cases an affirmative disclosure was required because failure to reveal material facts, in the light of the representations made in advertisements, made them misleading. Thus in the case of *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960), cited by the majority, the court said:

> Any requirement of an affirmative disclosure of a negative is always to be approached with caution. Merely because a remedy is useful for any one ailment is no reason to demand an accompanying statement of all the ills for which it is not beneficial. Even this principle, however, must yield *where the advertisements are misleading because of failure to reveal facts material in the light of the representations made therein. In arriving at such a conclusion the advertisements (format and copy) and the potential customer they are intended to reach must be analyzed.*

Id. at 954. [Emphasis supplied]

Similar reasoning may be found in *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); and *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

In *Royal Baking Powder Co. v. FTC*, 281 F. 774 (2d Cir. 1922), relied upon by the majority, a manufacturer by employing false and misleading labeling and advertising represented that a phosphate baking powder which it was offering for sale was the same as the more expensive cream of tartar baking powder which it had manufactured for many years. The baking powder company was in the position a liquor dealer would be in today if he used Haig & Haig pinch bottles and labels when purveying moonshine whiskey. The court held that the Commission properly ordered the company, by correcting its false and misleading advertising, to cease and desist from this unfair method of competition. In *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963), an advertisement represented that clocks offered for sale were manufactured by a "famous 150-year-old company", the original Waltham Watch Company of Massachusetts. The fact was that the original Waltham Company had nothing to do with the clocks offered for sale, which were imported from Europe. The Commission ordered the advertisers to cease and desist from using the name Waltham in connection with the sale of clocks unless the public was warned that they were not manufactured by the Waltham Watch Company in Waltham, Massachusetts.

The majority finds "that the orders in *Royal* and *Waltham* were the same kind of remedy the Commission has ordered here". I cannot agree. In those cases advertisements falsely represented that the products offered for sale were the same as the products, well-known to the public, which had been offered in the past. The Commission's orders simply required these false representations to be

corrected in future advertisements using the same or similar format or copy. In the present case, however, when Warner-Lambert has ceased and desisted from advertising Listerine as a remedy for colds and sore throats there will be nothing to correct in the text of the Listerine advertisements. Any "corrective statement" will relate solely to past advertising.

Finally, in considering the validity of the Commission's order the majority fails to focus on all its terms. Section III of the order forbids *any* advertisements for Listerine without the corrective statement. Yet it is conceded that Listerine is effective as a mouth wash and breath freshener, and it appears that in recent years much the greater part of Warner-Lambert's advertising budget for Listerine has been spent in promoting these uses of the preparation. Thus the Commission and the majority would forbid the publication of truthful advertisements of Listerine's effectiveness unless coupled with a disclaimer relating to uses advertised in the past. I cannot believe that the statute contemplates such a remedy, which goes far beyond the prevention of "illegal practices in the future."

The theory of the majority is that whenever "advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about [a] product" and "this belief [may] linger on after the false advertising ceases", corrective advertising may be ordered. As the majority apparently concedes, this test would apply to almost any advertisement which is the subject of a cease and desist order. I cannot accept this concept. I reject the proposition that the after-effects of advertising which has been discontinued pursuant to a cease and desist order can thus expand the Commission's statutory power to prevent future illegal practices. *See Heater v. FTC,* 503 F.2d 321, 323-25 (9th Cir. 1974). In my opinion such an expansion must be made by the Congress, not by this court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1138

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

Supplemental Opinion on Petition for Rehearing

Filed September 14, 1977

Before BAZELON, *Chief Judge,* and WRIGHT and ROBB, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* ROBB.

WRIGHT, *Circuit Judge*: In its petition for rehearing petitioner has urged this court to reconsider its earlier decision affirming, with some modifications, the order of the Federal Trade Commission requiring Warner-Lambert Company to cease and desist from deceptively advertising its product Listerine as a cure for colds or sore throat and affirmatively to correct in its future advertisements the impression created by its prior deceptive advertising. The primary argument raised in the petition for rehearing is that the Commission is barred by the First Amendment from imposing a corrective advertising order in this case. Having considered this claim carefully, it is our conclusion that it must be rejected. Because of the importance of the issues raised, however, we think it desirable to set forth in some detail our reasons for so concluding.

I

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court rejected prior precedents holding that commercial speech is "wholly outside the protection of the First Amendment." *Id.* at 761. In reaching this conclusion the Court emphasized the interest of consumers in the free flow of truthful information necessary for formulation of intelligent opinions and proper resource allocation. *Id.* at 764-765. Consistent with this concern, the Court was careful to distinguish truthful commercial speech from that which is false, misleading, or deceptive: "Untruthful speech, commercial or otherwise, has never been protected for its own sake. • • • Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." *Id.* at 771 (citations and footnote omitted). Furthermore, the Court went on to suggest that, because of the "commonsense differences" between commercial speech and other varieties, even commercial speech subject to First Amendment protections may nonetheless enjoy a "different degree of protection" than that normally accorded under the First Amendment. *Id.* at 771-772 n.24.

Applying these principles to the case at bar, there can be no question of the legitimacy of the FTC's role in regulating and preventing false and deceptive advertising. In this case it has been found that Warner-Lambert has, over a long period of time, worked a substantial deception upon the public; it has advertised Listerine as a cure for colds, and consumers have purchased its product with that in mind. That the Commission has authority to prohibit Warner-Lambert from continuing to make such false and deceptive claims in its advertisements is not disputed, for it is only truthful claims which are protected under the

First Amendment.[1] Here, however, the FTC has determined on substantial evidence that the deception of the public occasioned by Warner-Lambert's past advertisements will not be halted by merely requiring Warner-Lambert to cease making such claims in the future. To be sure, current and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed—and purchased—as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly.[2] It will induce people to continue to buy Listerine thinking it will cure colds. Thus the Commission found on substantial evidence that the corrective order was necessary to "dissipate the effects of respondent's deceptive representations." FTC op. at 41, JA 907.

Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of a continuing deception of

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[1] Cease and desist orders aimed at false or deceptive speech may, in theory, have a chilling effect on truthful speech, and be subject to First Amendment scrutiny on that account. In practice, however, this should rarely if ever be necessary. *See* pp. 4-5 *infra*.

[2] In this connection it is worth noting that Warner-Lambert currently advertises Listerine's ability to kill germs that cause bad breath. While we have no reason to doubt the truth of this claim, the emphasis on Listerine's germ-killing ability does seem to tie in closely with prior false advertising as to its capacity to alleviate health problems. *See* FTC op. at 38 n.28, JA 904.

the public. As the Supreme Court recognized in *Virginia State Board,* in some cases it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." 425 U.S. at 772 n.24. We must conclude—as did the Commission—that this is such a case.

II

Admittedly, corrective advertising orders such as that imposed here may give rise to concern as to their chilling effect on protected truthful speech. The potential advertiser must consider not only the possibility that he will be forced, at some future date, to abandon his advertising campaign, but also that he may be required to include specific disclaimers in future advertisements. But this danger seems more theoretical than real. As the Supreme Court pointed out in *Virginia State Board,* not only is the truth of commercial speech "more easily verifiable by its disseminator" than other forms of speech, but "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." 425 U.S. at 771-772 n.24.

Moreover, whatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced. *See* panel majority op. at 22-23 n.60; Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 HARV. L. REV. 661, 692-693 & nn.129-130 (1976) (emphasizing the relatively small

number of complaints issued by the FTC each year and the lengthy time period between complaints and orders); Note, *"Corrective Advertising" Orders of the Federal Trade Commission,* 85 HARV. L. REV. 477, 482-483 (1973).

III

A more serious First Amendment problem which may be raised by corrective advertising orders involves the burden thereby imposed upon the constitutional right recognized in *Virginia State Board* to advertise truthfully: the party subject to a corrective advertising order may be precluded from exercising his right to advertise unless he also includes specified statements undermining his prior deceptive claims. On the facts of this case, no burden is imposed upon truthful, protected advertising since, as the Commission makes clear, Listerine's current advertising, if not accompanied by a corrective message, would itself continue to mislead the public. Even if, in the circumstances of this case, the current and future advertising of Listerine is considered constitutionally protected speech, however, we think the corrective advertising order in this case remains appropriate.

The Supreme Court, in invalidating the state ban on advertising of prescription drug prices in *Virginia State Board,* considered the scope of the restriction on First Amendment rights, the governmental purposes and public interests affected by the ban, and the availability of alternative means to accomplish the legitimate governmental objectives. *See* 425 U.S. at 764-770. *See also Bates v. State Bar of Arizona,* —— U.S. ——, ————, 45 U.S. L. WEEK 4895, 4899-4903 (June 27, 1977). As we have indicated, it is not at all clear, even after *Virginia State Board,* that commercial speech protected by the First Amendment is, apart from "commonsense differences," entitled to the same degree of protection as other forms.[3] Indeed, the op-

[3] *See Virginia State Board of Pharmacy v. Virginia Citizens*

posite conclusion seems the more appropriate one.[4] But in any event, it does seem clear that the corrective advertising order in this case is the least restrictive means of achieving a substantial and important governmental objective and that, on balance, it must be upheld.[5] *Cf. Buckley v. Valeo*, 424 U.S. 1, 25-29, 65-68 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The governmental interest here, of course, is in protecting citizens against deception—with its attendant waste and misallocation by consumers to the benefit of the wrongdoers—by ensuring that advertising conveys truthful information to the public. As we noted earlier, it is this very interest which was invoked by the *Virginia State Board* Court as support for its conclusion that commercial speech is protected by the First Amendment. *See* 425 U.S. at 764-765. *See also Bates v. State Bar of Arizona, supra*, —— U.S. at ——, 45 U.S. L. WEEK at 4899.

Consumer Council, Inc., 425 U.S. 748, 779-781 (1976) (Stewart, J., concurring); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69 n.32 (1976); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 225 n.121 (1976).

[4] *Cf. Banzhaf v. FCC*, 405 F.2d 1082, 1101-1103 (D.C. Cir. 1968), *cert. denied, sub nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 842 (1969).

[5] We do not here consider whether the Commission, under principles of administrative exhaustion, should be required initially to decide this constitutional issue in light of the decision in *Virginia State Board*. The extent to which administrative exhaustion of constitutional claims is required presents difficult and unsettled questions of law, and since this point has been neither raised nor briefed by petitioner, we decline to address it in this decision. *See Mathews v. Eldridge*, 424 U.S. 319, 327-330 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764-767 (1975); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 20.00 to 20.00-3 (1977 Supp.); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682 (1977).

And the facts of this case make it eminently clear that this interest will not be substantially served by the less restrictive remedy—a cease and desist order. Whatever one may conclude as to the effect of Warner-Lambert's long history of deception on the protected status of its current advertising, we see no basis—and none has been offered—for questioning the Commission's conclusion that, absent a corrective remedy, consumers will continue to purchase Listerine as a cure for colds. *See* FTC op. at 38, JA 904. Indeed, at least one advocate of corrective advertising has urged that such orders not be confined to obvious cases such as *Warner-Lambert* where the proof presented to the Commission of the success of a deceptive campaign is so striking. Noting the long history of a deceptive claim uniquely asserted for Listerine, the absence of consumer confusion as to which mouthwash was effective against colds, and the persuasive evidence that this claim was believed by consumers after the false advertising had ceased, Professor Pitofsky has argued that "[c]omparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases. • • • If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*." *See* Pitofsky, *supra*, 90 HARV. L. REV. at 698.

Finally, the corrective advertising order in this case, by tying the quantity of correction required to the investment in deception, is tailored to serve the legitimate governmental interest in correcting public misimpressions as to the value of Listerine—and no more.[6] Taking all these factors into account, we think it beyond doubt that the FTC order is a valid one.

Petition for rehearing denied.

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[6] As the Commission itself noted, it may well be impossible to "determine in advance with computer-like precision the minimum

Robb, *Circuit Judge, dissenting*: I adhere to the view expressed in my dissent that the corrective advertising order imposed on Warner-Lambert goes beyond the statutory authority of the Federal Trade Commission. Accordingly, so far as that order is concerned I find it unnecessary to reach the constitutional question discussed by the majority. I would set aside the corrective advertising portion of the Commission's order.

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amount of corrective advertising which will dispel the otherwise continuing beliefs at issue." FTC op. at 39, JA 905. Even so, considering the 50 years of deceptive Listerine advertising, continuing inflation with attendant increased advertising costs leaves no doubt that the Commission is requiring a significantly smaller quantity of corrective advertising than prior deceptive advertising. As a result, any imprecision in the order's scope would seem likely to inure to Warner-Lambert's benefit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1138

September Term, 1977

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

BEFORE: Bazelon, Chief Judge; Wright and Robb, Circuit Judges

(FILED SEPTEMBER 14, 1977)

Order

On consideration of the petition for rehearing filed by petitioner Warner-Lambert Company, it is

ORDERED by the Court that the petition of Warner-Lambert Company for rehearing is denied for the reasons set forth in the supplemental opinion for the Court filed this date.

Per Curiam
For the Court:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Supplemental opinion for the Court filed by Circuit Judge Wright.

Dissenting opinion filed by Circuit Judge Robb.

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v.

FEDERAL TRADE COMMISSION, *Respondent*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

(FILED SEPTEMBER 14, 1977)

Order

On consideration of the suggestion for rehearing *en banc* filed by petitioner, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that petitioner's suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant petitioner's suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS

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v.

FEDERAL TRADE COMMISSION, *Respondent*

BEFORE: Bazelon, Chief Judge; Wright and Robb, Circuit Judges

(FILED SEPTEMBER 14, 1977)

Order

On consideration of the petition for rehearing filed by respondent Federal Trade Commission, it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk